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MEDIATION OF WIFE ABUSE CASES: THE ADVERSE IMPACT OF INFORMAL DISPUTE RESOLUTION ON WOMEN

LISA G. LERMAN*

PROLOGUE

Mrs. Carson came to the law school clinic where I worked¹ at the suggestion of the Citizen's Complaint Center,² where abused women are most frequently referred for help by the Washington, D.C. Police. Mrs. Carson had been referred to the Complaint Center by a staff worker at the battered women's shelter where she had gone to escape further abuse at home.

Most of the thousands of women who go to the Center each year³ are offered one of four legal options. Most of the women are referred to mediation, the least formal or adversarial of the options.⁴ The Complaint Center set up a mediation hearing for

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¹At the Antioch School of Law Women's Rights Clinic, I supervised students representing women with a variety of legal problems. The majority of our cases focused on obtaining protection from domestic violence for our clients.

Mrs. Carson's name and a few facts were altered in this Article, to protect her privacy, and to avoid any impact on her physical safety. She was represented by the Clinic during part of 1982. This account reflects Mrs. Carson's and my recollection of the events during that period.

²The Center is the major intake arm of the Washington, D.C. municipal court system for cases labelled "minor disputes." The Complaint Center processes thousands of cases each year.

³In 1980, 9889 people filed abuse complaints with the Center about family members, lovers, and neighbors; Bethel & Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 VT. L. REV. 15, 25 (1982).

⁴The Complaint Center runs a large mediation program staffed by trained volunteers.

Mrs. Carson, but refused to initiate more serious action because "nothing had happened yet." "Nothing" turned out to include a history of twenty-five years of beatings. During one incident, Mr. Carson pushed his wife through a plate glass window. Six months before I met Mrs. Carson, she had experienced a beating which left her with blood clots. She was taking a high dose of anticoagulants, which would make it very difficult to stop the bleeding if she were cut; a severe laceration could have been fatal.

Mrs. Carson is a deeply religious woman who was reluctant to leave her husband. To protect herself and her four children, she had asked him to move into the first floor of the house, while she and the children lived in an apartment on the second floor. He had begun making threatening phone calls every day, and was intruding into her part of the house uninvited, ostensibly to visit the children. After twenty-five years of exposure to her husband's patterns of violence, she sensed that he was building up to another serious beating. She was afraid that she would bleed to death. Mrs. Carson went to stay at the shelter, taking her children with her.

In addition to offering Mrs. Carson their mediation services, the Complaint Center referred her to my clinic because she wanted a legal separation. Despite her religious reservations about leaving her husband, she had had enough. Following our usual procedure, we first ascertained the general details of Mrs. Carson's situation, and then reworked with her the decisions that had been made at the Complaint Center to find out whether she

The hearings, which usually consist of one long meeting, often result in a voluntary agreement between the parties.

The second option is to refer the victim for a civil protection order, under which a court may issue orders addressing a wide range of problems, from transfer of personal property from one party to the other to cover court costs, to police protection for the victim. See D.C. CODE ANN. § 16-1005(c) (1981 & Supp. 1983). Currently, the Corporation Counsel, the victim, or her private counsel may file a petition for a protection order. At the time of Mrs. Carson's case, only the Corporation Counsel could file a petition.

The third option is to refer the case for a hearing in the U.S. Attorney's Office, which doubles as the office of the local D.C. prosecutor. These hearings, which usually consist of an informal meeting between the victim and abuser with a prosecutor present, ostensibly screen cases to determine when criminal charges should be filed. In practice, charges are almost never brought in domestic abuse cases, although the perpetrator may be verbally reprimanded by the prosecutor at the hearing.

The fourth option is for the Corporation Counsel to send out a warning letter to the abuser, informing him that a complaint has been filed, that the alleged conduct is against the law, and that he will suffer severe consequences if the abuse recurs. See Bethel & Singer, *supra* note 3, at 25.

was satisfied with them. We discovered that Mrs. Carson really wanted a protection order. One of the students at the law school clinic returned to the Complaint Center with her to persuade the Corporation Counsel to file a petition.⁵

Mrs. Carson was ambivalent about mediation. She thought she should try it, although she didn't think it would do much good. I agreed with her skepticism, but did not want to impose my views about mediation on her. I offered to accompany her to the hearing after she indicated that she would feel more comfortable if she didn't have to go alone.

I met Mrs. Carson at the Complaint Center the morning of the hearing; after about an hour's wait, her name was called. The two mediators, a Black man and a white woman, were in a small room with a table and four chairs. I asked permission to remain; but the mediators refused, asserting that my presence would make it more difficult to reach an agreement. The mediators were trained lay volunteers, not lawyers; they may have seen the presence of an attorney as a threat to their authority and ability to control the hearing. I then offered to sit quietly in the back of the room to be available if Mrs. Carson had questions or wanted advice from an advocate. Again the mediators refused. I declined their suggestion that I remain outside in the hall during the mediation and talk to Mrs. Carson at the conclusion of the hearing. Mrs. Carson decided to participate in the hearing nonetheless.

The hearing produced an agreement specifying when Mr. Carson could visit the children upstairs, and when he could telephone his wife. The violence was not mentioned. Mrs. Carson later explained that her husband would not admit to any of the abuse. She told me that the woman mediator met with her alone during the hearing and told her that she should listen to her husband even if he kept company with prostitutes. After the hearing, someone from the Complaint Center called Mrs. Carson to find out how she felt about the hearing. She was asked if the hearing was fair. She said no. She was asked whether she got "equal time." She said no.

Two weeks later, Mrs. Carson also obtained a civil protection order. The order required Mr. Carson to move out of the house

⁵Because no private right of action was available at that time, *see supra* note 4, all requests for protection orders had to be channelled through the Complaint Center to the Corporation Counsel.

but he never did so. Mrs. Carson wanted to protect the children from abuse, as well as herself, but the court refused to include the children in the order.

Eight months later, I happened to walk into the courtroom where all the abuse cases are heard. Mrs. Carson was on the witness stand, explaining that she had been living in a battered women's shelter for three weeks because her husband had beaten her again in violation of the protection order. Mr. Carson jumped up to object that she was lying. The judge told him to sit down. Ultimately, Mr. Carson was found not guilty of criminal contempt, and, therefore was not punished for his repeated acts of violence.⁶

Mrs. Carson's case is in many ways typical of cases "resolved" by mediation. Her case was unusual, however, because she obtained a protection order in addition to the mediation agreement. Without this protection order, her account of the subsequent beating would not even have reached a courtroom. The beating did not violate the mediation agreement because the agreement said nothing about the violence. Even if the abuse had specifically contravened the agreement, Mrs. Carson's only remedy would have been to return to the Complaint Center to discuss what went wrong.

Mrs. Carson should have been offered a choice among the remedies available to stop violence. She should not have had to hire a lawyer to find out that she could seek more than one remedy at a time. She should not have been assigned to one forum in lieu of others. The violence should have been addressed in the agreement. She should have had the option to have an advocate present at the mediation hearing. The mediated agreement could have been converted into a consent civil protection order, to allow imposition of penalties for any violations.

As awareness of the extent and severity of domestic abuse has developed during the past decade, many different types of remedies have evolved. Although, as Mrs. Carson's story illustrates,

⁶Mrs. Carson stayed in the shelter for a while, and then moved into her own apartment, despite pressure from a legal services lawyer to return to her husband. For some time she served on the Board of Directors of the shelter. At present she still lives apart from her husband, but worries that when her rent goes up she will be unable to afford her apartment and will have to move back into the house she shared with her husband.

there are problems inherent in mediation of domestic abuse cases,⁷ mediation has become one of the most widely used remedies for spousal violence. The use of mediation is premised on the notions that families should be protected from the intrusiveness of the justice system, and that problems within families are best solved through informal remedies that help the parties to communicate more effectively.

Another general approach to remedying domestic abuse is to use the formal powers of the legal system to protect the victim and to punish or deter subsequent violence. These two dominant, and perhaps irreconcilable, theories of domestic violence prevention may be termed the "conciliation" model and the "law enforcement" model. Proponents of the conciliation model offer a psychological explanation for the violence, and focus on the role of the victim or of both parties in precipitating the violence. Proponents of the law enforcement model look for causes of violence in the psychology of the abuser or in the behavior of families and public agencies which accept or condone violence within families.

This Article articulates a law enforcement critique of domestic violence mediation. It will explain the feminist view that mediation in abuse cases is based on misconceptions about the nature of wife abuse, and that mediation not only fails to protect women from subsequent violence, but also perpetuates their continued victimization.⁸ The Article will recommend that other remedies be preferred over mediation. Recognizing that many programs will persist in mediation of wife abuse cases, however, the Article recommends that those programs should adopt procedures which will offer protection to victims of abuse, will make clear to the abuser that stopping the violence is his responsibility, and will allow enforcement of mediation agreements.

⁷See *infra* text accompanying notes 114-90.

⁸In characterizing this approach as feminist, I do not mean to imply that all feminists or advocates for abused women would agree with the views expressed in this Article.

I. WIFE ABUSE: THE NATURE OF THE PROBLEM

Psychologist Anne Ganley defines wife abuse⁹ to include four types of battering: (1) physical battering, which includes "all aggressive behavior done by the offender to the victim's body";¹⁰ (2) sexual violence, "[w]hich include[s] physical attacks on the victim's breasts/genitals or forced sexual activity accompanied by either physical violence or the threat of physical violence";¹¹ (3) psychological battering, which includes all forms of emotional abuse that occur in a situation in which there has been at least one episode of physical battering;¹² and (4) destruction of property or pets.¹³

Although adequate incidence data on wife abuse has not yet been compiled,¹⁴ the available data offer some information on the extent of the problem. One estimate is that three to four million women are beaten by their mates every year in the United States and that three to four million others have been battered in the past and remain in abusive relationships.¹⁵ Of over 2000 women interviewed in Kentucky, one in ten had experienced some form of spousal violence during the twelve months prior to the inter-

⁹Although some men are beaten by their mates, most adult victims are female. R. DOBASH & R. DOBASH, *VIOLENCE AGAINST WIVES* 12, 20 (1979). Therefore, throughout this Article, victims of abuse are referred to as female. Women are subject to violence by intimates, regardless of marital status or living arrangements; wife abuse, spouse abuse, and domestic violence are used generically and interchangeably.

¹⁰A. GANLEY, *COURT-MANDATED COUNSELING FOR MEN WHO BATTER: A THREE-DAY WORKSHOP FOR MENTAL HEALTH PROFESSIONALS — PARTICIPANT'S MANUAL* 9 (1981).

¹¹*Id.* at 10.

¹²*Id.* at 11. Psychological battering includes a wide range of behavior, from threats of suicide or childsnatching, to requiring the victim to eat cigarette butts or lick a line across the kitchen floor. It includes "controlling" behavior, by which the abuser regulates the victim's sleep, eating, and social activities, and conduct designed to frighten the victim, such as playing with a gun.

¹³Although this type of abuse is often not treated as serious, it can have the same harmful psychological impact on a victim as physical or sexual battering. *Id.* at 14-15.

¹⁴Research funds are limited. The Carter Administration's Office on Domestic Violence in the Department of Health and Human Services had planned a major national incidence study on spouse abuse. This study was cancelled by the Reagan Administration.

¹⁵See E. STARK, A. FLITCRAFT, D. ZUCKERMAN, A. GREY, J. ROBISON & W. FRAZIER, *WIFE ABUSE IN THE MEDICAL SETTING: AN INTRODUCTION FOR HEALTH PERSONNEL* vii (1981) [hereinafter cited as *WIFE ABUSE IN THE MEDICAL SETTING*]; Stark, Flitcraft & Frazier, *Medicine and Patriarchal Violence: The Social Construction of a 'Private Event'*, 9 INT'L J. HEALTH SERVICES 461 (1979); cf. M. STRAUS, R. GELLES & S. STEINMETZ, *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* 32 (1980) (estimating that spousal violence occurs in almost one out of every three marriages).

view.¹⁶ The F.B.I. crime reports indicate that forty percent of female homicide victims in the United States are killed by family members or boyfriends.¹⁷ Battering occurs in all racial, economic, and religious groups, in rural, urban, and suburban settings.¹⁸ Many police departments report that about one-third of police time is spent on domestic abuse calls.¹⁹

Although some cases involve only one violent incident during a relationship (usually at the point of separation),²⁰ battering more commonly recurs and becomes an established pattern in a relationship.²¹ Some researchers suggest that battering escalates over time.²² Battering often becomes more frequent or more severe during pregnancy; often the abdominal area is beaten, leading to stillbirths, miscarriages, birth defects, and other medical complications.²³

Children are frequently present during battering, and often become physically involved in the incidents. Children exposed to battering may be emotionally traumatized.²⁴ Boys who witness violence by their fathers against their mothers, as well as children who are physically abused themselves, are more likely to abuse their mates than are boys who are not exposed to such violence.²⁵

¹⁶M. SHULMAN, A SURVEY OF SPOUSAL VIOLENCE AGAINST WOMEN IN KENTUCKY 13 (1979) [hereinafter cited as SPOUSAL VIOLENCE SURVEY].

¹⁷UNITED STATES DEPARTMENT OF JUSTICE, F.B.I. UNIFORM CRIME REPORTS 1979 10-11 (1980).

¹⁸See M. STRAUS, R. GELLES & S. STEINMETZ, *supra* note 15, at 123-52.

¹⁹O'Reilly, *Wife-Beating: The Silent Crime*, TIME, Sept. 5, 1983, at 23.

²⁰Presentation by Joan Kelly on "Custody and Domestic Violence" at the Annual Meeting of the National Association of Women Judges, Oct. 8, 1983, in San Francisco, California.

²¹One study asked 1793 women only about incidents of violence within the last twelve months. Half of those who had experienced any violence within the last year had been abused two to five times. See SPOUSAL VIOLENCE SURVEY, *supra* note 16, at 20. Twenty percent of those abused had been abused twice, ten percent three times, ten percent four times, and ten percent five times within one year. *Id.* In another study of 109 battered women living in shelters, "a majority . . . experienced at least two attacks a week. Twenty-five percent said that the violence usually lasted from 45 minutes to over 5 hours; the other 75% reported that the physical attack lasted 30 minutes or less." R. DOBASH & R. DOBASH, *supra* note 9, at 120. See generally S. SCHECHTER, WOMEN AND MALE VIOLENCE 19 (1982) (discussing the Dobash study).

²²See, e.g., R. DOBASH & R. DOBASH, *supra* note 9, at 124-25; S. SCHECHTER, *supra* note 21, at 222-23.

²³See L. WALKER, THE BATTERED WOMAN 105-06 (1979).

²⁴See *id.* at 149-50.

²⁵See D. MARTIN, BATTERED WIVES 23-24 (1981); Thomas, *Custody Litigation Strategies for Battered Women*, 8 WOMEN'S RTS. L. REP. (forthcoming 1984); but see R. DOBASH & R. DOBASH, *supra* note 9, at 152-55.

During the last thirty years, there has been a rapid evolution of theories on the causes of wife abuse.²⁶ In the 1950's, the dominant school of psychiatric thought found the causes of abuse in female masochism; women were beaten because they craved punishment at some hidden psychological level.²⁷ In the 1970's, victims of abuse and other women began to organize networks of safe houses and shelters. During that decade, over 500 shelters for battered women were established and numerous advocacy groups were founded.²⁸

Lenore Walker's widely-known theory of "learned helplessness,"²⁹ explaining why women remain in violent homes, emerged from this heightened consciousness about domestic abuse. Walker explained that women are socialized neither to assert themselves nor to protect themselves, but rather, to expect others to perform those functions. Abused women, therefore, blame themselves for the violence inflicted upon them, and feel powerless to escape abusive situations.³⁰ Walker outlined a three-step cycle of violence: first, the abuser goes through a tension-building phase, in which he becomes increasingly angry but does not express his feelings. This is followed by an outburst, when he may physically abuse the woman. The final stage is the aftermath of the outburst; the abuser is loving and apologetic, and promises the woman that there will be no future violence.³¹ This cycle, Walker urges, reinforces the woman's felt helplessness — she wants to believe that her mate will change, so she remains in a situation in which she is powerless to make herself safe.³²

Once the psychology of the victim was better understood, psychologists began to question not only why victims tolerate violence, but also why abusers use violence. In the late 1970's, psychologists posited that domestic violence was caused by the abuser rather than by the victim. The theory of learned behavior, applied to the question of why the abuser uses violence to resolve

²⁶For an analysis of various theories of sources of violence see R. DOBASH & R. DOBASH, *supra* note 9, at 19-30.

²⁷See, e.g., Snell, Rosenwald & Robey, *The Wifebeater's Wife: A Study of Family Interaction*, II ARCHIVES GEN. PSYCHIATRY 107 (1964).

²⁸CENTER FOR WOMEN POLICY STUDIES, DOMESTIC VIOLENCE: INFORMATION SERIES, NO. 1, PROGRAMS PROVIDING SERVICES TO BATTERED WOMEN (3d ed. 1980).

²⁹L. WALKER, *supra* note 23, at 42-54.

³⁰See *id.* at 42-54.

³¹*Id.* at 55-70.

³²*Id.* at 66-69.

conflicts, postulates that an abuser learns as a child not to express feelings. Instead, he uses force to attain his ends.³³

While the psychologists developed behavioral theories, others in the battered women's movement questioned these explanations of domestic violence which rest on individual psychological analysis. Battering is such a common and accepted phenomenon that community values, society's general attitudes toward male-female relations, and the behavior of health and law enforcement officials must be implicated in the causes of violence. Russell and Rebecca Dobash, two sociologists known for their work on wife abuse in Britain, argue that violence against women by their mates is one expression of the patriarchal structure of society. They argue that police, courts, doctors, ministers, and others from whom abused women seek help, respond to the problem in ways that perpetuate the violence rather than protect the victims. The Dobashes argue that most victims of abuse do seek protection from police, churches, doctors, and others. When public agencies responsible for crime prevention and provision of social services fail to provide the needed assistance, these institutions become part of the problem.

II. TRADITIONAL RESPONSE OF THE LEGAL SYSTEM TO WIFE ABUSE

Perceptions of the state's appropriate role with respect to intrafamily crime have changed dramatically during the last century. Traditionally, husbands were legally responsible for members of their families, and therefore were permitted to use force to punish misconduct by their wives or children.³⁴ At common law, a husband was prohibited only from using a rod thicker than his thumb to beat his wife.³⁵ During the last half of the nineteenth century most states — either judicially or legislatively — prohibited physical assaults on spouses.³⁶ During the 1970's and 80's,

³³See A. GANLEY, *supra* note 10, at 20-26.

³⁴See *infra* text accompanying notes 92-93.

³⁵Davidson, *Wifebeating: A Recurring Phenomenon Throughout History*, in *BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE* 2, 18 (M. Roy ed. 1977).

³⁶See UNITED STATES COMMISSION ON CIVIL RIGHTS, *UNDER THE RULE OF THUMB:*

many states began to enact other civil and criminal laws to expand the legal protection accorded abused women.³⁷

Prior to the 1970's, little attention was paid to the problem of wife abuse. Women who called the police for help often received no response at all. If the police did respond to the call, they often made only superficial efforts to cool down the situation, such as taking the abuser for a walk around the block, but they usually would not make an arrest or file a report.³⁸ Women seeking court assistance found that none of the available remedies proved very useful in stopping violence. In many jurisdictions, courts frequently issued peace bonds against abusers ordering that the violence stop; violation of such orders would cause abusers to forfeit any bonds they had posted. In general, however, the courts did not require any bond to be posted, thus depriving victims of leverage to secure compliance and of any enforcement mechanism.³⁹

Another common "remedy" for abuse was divorce. Before the addition of no-fault provisions to the divorce laws, victims of abuse were granted divorces based on demonstrated cruelty by their husbands. In most states victims could secure an injunction while the divorce action was pending, requiring that there be no violence, and sometimes prohibiting contact between the parties. Like the peace bond, most of these injunctions included no enforcement provisions. The order expired upon the granting of a divorce, and no further protection was available to the woman.⁴⁰

In egregious abuse cases, prosecutors occasionally would file charges, but their skepticism about the seriousness of the crime, the absence of provocation, and the likelihood that the complain-

BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 2 (1982) [hereinafter cited as RULE OF THUMB].

³⁷See Lerman & Livingston, *State Legislation on Domestic Violence*, RESPONSE, Sept./Oct. 1983, at 1. For example, many states recognized rape as a criminal action even within marriage and thus prohibited sexual assault against one's spouse. See D. RUSSELL, *RAPE IN MARRIAGE* 17-24 (1982).

³⁸In 1965 the International Association of Police Chiefs stipulated that "[i]n dealing with family disputes the power of arrest should be exercised as a last resort." IACP training Key #16, *Handling Disturbance Calls* 3 (1965). See generally Parnas, *The Police Response to the Domestic Disturbance*, 1967 WIS. L. REV. 914 (arguing that the police have failed to recognize and effectively deal with domestic violence).

³⁹Parnas, *Prosecutorial and Judicial Handling of Family Violence*, 9 CRIM. L. BULL. 733, 748 (1973).

⁴⁰See Lerman & Livingston, *supra* note 37, at 3.

ing witness would appear in court to testify, rendered prosecution of spousal assault extremely rare.⁴¹

During the last fifteen years official response to wife abuse has evolved rapidly, propelled largely by advocates for battered women. Grass roots groups have organized shelters, conducted extensive training and public education, negotiated endlessly with public officials to encourage improved response, and drafted new legislation.

III. CONTEMPORARY RESPONSES TO WIFE ABUSE: THE CONCILIATION MODEL AND THE LAW ENFORCEMENT MODEL

Two models have emerged in the development of legal remedies for wife abuse. The conciliation model has favored establishment of programs which are concerned with the special problems of violent families, but which rely on informal resolution of the "disputes."⁴² Most commonly, this method of dispute resolution is implemented through mediation⁴³ sessions involving the victim, the abuser, and the official to whom the victim has turned for help.⁴⁴

In most disputes which reach mediation, no formal legal action has been initiated, or the criminal charges which have been filed are suspended or dismissed when the case is referred to a mediation program. In general, the agreements reached are not enforceable in court.⁴⁵ The parties participate voluntarily in mediation

⁴¹In Washington, D.C. in 1966, for example, 7500 women asked the prosecutor's office to issue warrants for the arrest of their husbands. Warrants were issued in less than 200 of these cases. Field & Field, *Marital Violence and the Criminal Process: Neither Justice nor Peace*, 47 SOC. SERV. REV. 221, 224-25 (1973).

⁴²See, e.g., Bard & Connolly, *The Police and Family Violence: Policy and Practice*, in UNITED STATES COMMISSION ON CIVIL RIGHTS, *BATTERED WOMEN: ISSUES OF PUBLIC POLICY* 304 (1978) [hereinafter cited as *ISSUES OF PUBLIC POLICY*].

⁴³Mediation refers to "any dispute resolution process in which a third party with no formal coercive powers intercedes to promote a voluntary settlement between disputants." Bethel & Singer, *supra* note 3, at 17. For purposes of this discussion, mediation will be defined as a process in which disputants meet with a neutral third party to draw up an informal agreement to resolve differences.

⁴⁴Another trend within this model is a "family systems" approach to providing psychological counseling for couples. See generally A. GANLEY, *supra* note 10.

⁴⁵Many fora for resolution of minor disputes have elaborate enforcement mechanisms. In Small Claims Court, for example, individuals who sue others for negligible amounts

(neither is under court order to appear) and if they fail to reach an agreement, no resolution is imposed on them by the third party. Police, prosecutors, judges, and court clerks do, however, refer thousands of abuse cases annually to large publicly-funded mediation programs.⁴⁶ The mediators in some programs are trained volunteers; in others, mediation is conducted by full-time staff. Some mediators have professional training in law, mental health, or social work; others have none. Most mediators do receive some minimal in-house training.

All over the country courts and private agencies are setting up mediation programs to resolve a wide variety of "minor disputes" in the family setting before they reach formal adjudication.⁴⁷ Almost invariably, wife abuse cases are regarded as controversies too trivial to deserve court attention and are placed in this category of "disputes."⁴⁸

The primary explanation for the rapid growth of mediation is an economic one. Prosecutors carry unmanageable caseloads.⁴⁹ Criminal and domestic relations courts have enormous backlogs, and are anxious to find an alternative forum to which they can

of money can subpoena witnesses, secure bench warrants, conduct discovery, and attach assets to enforce the judgments they obtain. *See, e.g.*, D.C. CODE ANN. §§ 16-3901 to 16-3910 (1981). The remedies available to women for "minor disputes" with their partners vary in form but consistently deny access to enforcement mechanisms. This lack of enforceability characterizes peace bonds, injunctions issued as part of divorce proceedings, and mediation. *See supra* text accompanying notes 38-41.

⁴⁶*See, e.g.*, UNITED STATES DEPT. OF JUSTICE, NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: FINAL EVALUATION REPORT 22, 27 (1980) [hereinafter cited as NJC EVALUATION].

⁴⁷One recent article, for example, encouraged couples to seek mediation: (1) before marriage, to prevent subsequent disputes; (2) to resolve disputes between disabled family members and others; (3) to address parent-child conflicts over teenage pregnancy; (4) to resolve problems arising from homosexual breakups; (5) as a counseling service for unmarried cohabitants; (6) to resolve struggles between teenagers (especially runaways) and parents; (7) to solve problems arising from a family move; (8) to address domestic violence (illustrated by a drawing of a woman hitting a man with a rolling pin); (9) to resolve separation and divorce issues; (10) to settle custody and visitation problems; (11) for counseling in disputes arising from retirement; (12) to discuss problems between elderly people and middle-aged children; and (13) to work out estate planning problems. Vroom, Fassett & Wakefield, *Winning Through Mediation: Divorce Without Losers*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 3, 7-8 (1982).

⁴⁸*See* NJC EVALUATION, *supra* note 46, at 30, 143, 146, 149. On interview, judges agreed that cases involving "excessive violence" ought not to be referred to mediation centers, but they did not agree as to "when family and domestic disputes were to be referred." *Id.* at 82-83.

⁴⁹*See, e.g.*, VERA INSTITUTE OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS xv (1977). This report complains of the need for alternatives to prosecution of "prior relationship assaults" and notes that the cases strain the already excessive caseloads carried by prosecutors. *Id.* at xiv-xvi, 61-62.

transfer a substantial group of cases. Proponents of mediation explicitly acknowledge that they are motivated in part by a desire to help courts and law enforcement agencies resolve these problems.⁵⁰ Mediation conducted by a private agency, it is further argued, is cheaper than litigation.⁵¹

Advocates of the conciliation model view mediation as preferable to formal dispute resolution mechanisms for a wide range of humanitarian, client-focused reasons. Factors making mediation attractive include: "1. Avoidance of unnecessary hostility 2. A measure of client autonomy in constructing the solutions 3. Avoiding the traditional two-attorney fight."⁵² Professor Frank Sander of Harvard Law School favors mediation over more formal options for cases in which the parties have a long-term relationship because those parties may work out an agreement addressing the ongoing problems underlying the superficial dispute.⁵³ Law professor Paul Rice proposes mediation as an alternative to the criminal justice system which frequently acquits defendants on procedural grounds, fails to prosecute "culpable 'victims,'" sentences without regard to victims' needs, imposes disproportionately small penalties for serious crimes, operates inefficiently, requires victims to attend multiple hearings, grants frequent continuances, and fails to inform witnesses of the status of a case.⁵⁴

Mediation of domestic violence cases is rarely promoted by those who specialize in advocacy for battered women, but is supported by advocates of alternative dispute resolution in family-related cases.⁵⁵ Domestic relations attorneys are flocking to training sessions on mediation, and are using mediation instead

⁵⁰The stated goal of the Columbus Night Prosecutor's Program, for example, is to divert a maximum number of minor disputes before they reach the courtroom and to devise viable agreements in a maximum number of cases so that they will not return to the court system. Laszlo & McKean, *Court Diversion: An Alternative for Spousal Abuse Cases*, in ISSUES OF PUBLIC POLICY, *supra* note 42, at 347-49.

⁵¹Silberman, *Professional Responsibility Problems of Divorce Mediation*, 7 FAM. L. RPT. (BNA) 4001, 4001 (1981).

⁵²Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219, 219 (1982).

⁵³Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 120-24 (1976).

⁵⁴Rice, *Mediation and Arbitration as a Civil Alternative to the Criminal Justice System-An Overview and Legal Analysis*, 29 AM. U. L. REV. 17, 18 (1979).

⁵⁵The American Bar Association's Special Committee on Alternative Means of Dispute Resolution sponsored a national conference in June of 1982 in Washington, D.C. on mediation of domestic relations cases. Almost every speaker heartily advocated increased use of mediation in domestic relations cases.

of litigation whenever possible. Many prosecutors have initiated massive mediation programs to reduce their own caseloads by informally resolving minor disputes instead of prosecuting them.⁵⁶ Social service and mental health agencies frequently set up mediation programs in an effort to serve humanitarian goals.⁵⁷ Federal and local grant programs fund numerous mediation programs.⁵⁸

Finally, under the guidance of Professor Morton Bard, many of the nation's police departments have adopted "crisis intervention" techniques as their primary response to "disturbance" (mainly domestic violence) calls. Police are trained to "defuse" the situation upon arrival at the scene, and then to attempt on-the-scene mediation rather than to take any formal action against the offender.⁵⁹

The "law enforcement" model, in contrast, is espoused both by grass roots advocates working with battered women, and by an increasing number of court officials, police officers, and others who provide services to battered women. In general, the law enforcement model advocates formal legal action combined with punishment or rehabilitation of wife abusers. The goal is to ensure the safety of the victim and to give the abuser a clear message that society will not tolerate his continued violence against his mate.⁶⁰

Legislation has been enacted in a majority of states authorizing issuance of protection orders,⁶¹ and expanding police power to

⁵⁶See *supra* note 50.

⁵⁷A mediation program in Salem, Massachusetts, for example, gives parties "the opportunity to express their feelings both in joint sessions and in private sessions with the mediators to allow full disclosure with dignity." Orenstein, *The Role of Mediation in Domestic Violence Cases*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 401, 406 (1982). The program is described as "an important complement to the protection that courts offer in domestic violence cases." *Id.* at 415.

⁵⁸Of 180 programs identified by the ABA Special Committee on Alternative Means of Dispute Resolution, 29% are funded by the courts or the district attorney, 36% by local government, 28% by federal government, 24% by private sources, and 6% by fees. Ray, *Domestic Violence Mediation Demands Careful Screening*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 417, 423 (1982).

⁵⁹See Bard & Connolly, *supra* note 42, at 306-07. In 1978, 71% of all police jurisdictions in the United States were giving some form of training in family crisis intervention. *Id.* at 310.

⁶⁰See R. DOBASH & R. DOBASH, *supra* note 9, at 234-43; S. SCHECHTER, *supra* note 21, at 1-8, 29-52, 192-202.

⁶¹See Lerman, *Protection of Battered Women: A Survey of State Legislation*, 6 WOMEN'S RTS. L. RPTR. 271, 272-73, 276-78 (1980) [hereinafter cited as *State Legislation Survey*].

make arrests in abuse cases.⁶² Many prosecutors have adopted aggressive policies in spouse abuse cases, including filing charges in greater numbers of cases, offering support and protection to victims, and prohibiting dismissal of charges absent compelling circumstances.⁶³

Proponents of the law enforcement and conciliation responses to wife abuse often pursue their divergent goals within one community and even have overlapping caseloads. Strangely, many feminist advocates for battered women find themselves in the traditionally right-wing position of advocating law and order, amidst an outpouring of humanitarian sentiment favoring use of informal techniques such as mediation.

While there is a general consensus in the feminist community against mediation of abuse cases,⁶⁴ some feminists support use of mediation in other cases.⁶⁵ Many feminists perceive mediation as one escape from a court system which so frequently discriminates against women.⁶⁶ Mediation has been increasingly used in divorce, custody, and property disputes between couples, and as an alternate court system for lesbians, illegal aliens, and others who have limited access to formal legal remedies.

IV. THE LAW ENFORCEMENT CRITIQUE OF MEDIATION

A recent Civil Rights Commission report on the legal response to domestic violence succinctly articulated some serious problems with mediation:

⁶²See *id.* at 274, 280.

⁶³See L. LERMAN, PROSECUTION OF SPOUSE ABUSE: INNOVATIONS IN CRIMINAL JUSTICE RESPONSE 33-36 (1981) [hereinafter cited as PROSECUTION OF SPOUSE ABUSE].

⁶⁴See, e.g., Hart, *Mediation for Battered Women: Same Song, Second Verse—Little Bit Louder, Little Bit Worse* (unpublished manuscript 1984) (available at the HARV. WOMEN'S L.J. office).

⁶⁵The 14th National Conference on Women and the Law, held in Washington, D.C. in 1983, included five separate panel discussions on mediation. However, at four of these workshops, only proponents of mediation were invited to speak.

⁶⁶One instance of discrimination against women by the courts is evident in New York City's Family Court system: the clerks, acting as gatekeepers to the courthouse, deny most abused women court hearings to determine their entitlement to protection. See Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RTS. L. RPTR. 7, 11, 23-25 (1978).

Mediation and arbitration place the parties on equal footing and ask them to negotiate an agreement for future behavior. Beyond failing to punish assailants for their crimes, this process implies that victims share responsibility for the illegal conduct and requires them to modify their own behavior in exchange for the assailants' promises not to commit further crimes.⁶⁷

Mediation as a remedy for wife abuse is criticized for several different reasons. First, many critics disagree with mediators' assumptions about the nature and seriousness of family violence, about the role of the state in family life, and about the usefulness of formal legal action in stopping violence.⁶⁸ Second, relying largely on experience with their own clients and on a limited amount of research, the critics believe that mediation is an ineffective remedy for abuse.⁶⁹ Third, the goals of mediation — reaching an agreement, reconciling the parties, recognizing mutual responsibility for the problem, and removing abuse cases from the court system — are arguably incompatible with the law enforcement model's primary goal of stopping violence.⁷⁰

Fourth, many structural aspects of mediation are criticized as ill-suited to the problems presented by a wife abuser and his victim. These problems revolve around the summary nature of mediation, the lack of accountability, the failure to account for the parties' vastly unequal bargaining power, and the use of mediation to bar abused women from access to courts for enforceable protection from future violence or punishment of the abuser for past violence. Although mediation of wife abuse cases aids the justice system by disposing of a group of troublesome cases, this remedy may not be useful to protect victims.⁷¹

Finally, critics of mediation point out that the agreements reached in abuse cases are woefully inadequate, not only because they have no legal force, but also because they fail to address the issue of violence, or treat the violence as caused at least in part by the victim.⁷²

⁶⁷RULE OF THUMB, *supra* note 36, at 96.

⁶⁸See *infra* text accompanying notes 73–113.

⁶⁹See *infra* text accompanying notes 114–21.

⁷⁰See *infra* text accompanying notes 122–49.

⁷¹See *infra* text accompanying notes 150–73.

⁷²See *infra* text accompanying notes 174–90.

A. Assumptions Underlying Mediation

1. The nature and seriousness of wife abuse

Most proponents of mediation agree with its critics that cases of serious violence should not be mediated.⁷³ Similarly, they acknowledge that mediation is more likely to be effective where the parties come to mediation with "relatively equal bargaining positions."⁷⁴ They also note that when one party is very frightened of the other, her ability to make independent decisions may be impaired and thus mediation may not be workable.⁷⁵ One proponent suggests that "when trust has been seriously eroded, no agreement can be worked out."⁷⁶ The disagreement between mediation advocates and the law enforcement advocates centers on the questions of what constitutes serious violence, and which situations are so imbued with coercion that mediation cannot be a fair remedy for the weaker party.

A recent article by Charles Bethel and Linda Singer illustrates these different views of wife abuse. The authors describe a typical case in which "mediation offers a better solution than traditional legal remedies."⁷⁷ The intake notes read as follows:

*C and R [complainant and respondent] have known each other four years. On 3-15-81 R spent the night with C then left to visit a female friend. Later returned and a fight started with R beating C. C sent to Capitol Hill Hospital. Bruised but nothing broken. Given pills for pain. Last time a fight started R choked C. C wants R to stay away from her. C is uneasy about R coming to home yesterday to repay a financial debt. R brought an ex-con with him. C thinks there might be some retaliation through this ex-con. C changed lock. R carries a gun. C wants record albums back.*⁷⁸

⁷³Bethel & Singer, *supra* note 3, at 16.

⁷⁴Winks, *Divorce Mediation: A Non-adversary Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615, 643-44 (1980-81).

⁷⁵Bethel & Singer, *supra* note 3, at 16.

⁷⁶Winks, *supra* note 74, at 644.

⁷⁷Bethel & Singer, *supra* note 3, at 22.

⁷⁸*Id.*

The agreement included promises by *R* to return the record albums, to pay some medical bills, and to refrain from physical violence.⁷⁹

The District of Columbia Mediation Service, where this case was mediated, maintains strict standards for screening out serious cases: "[N]o case of domestic violence will be mediated if 1) the victim has suffered serious injury; 2) a gun was used to threaten the victim; 3) the violent behavior is repetitive; or 4) there does not appear to be sufficient parity of bargaining power between parties."⁸⁰ Bethel and Singer apparently viewed this case as sufficiently within those standards to be presented to the public as a model.

A more searching analysis and application of these standards raises numerous questions about the appropriate use of mediation in the case described. Injuries sufficiently severe to send the victim to the emergency room might reasonably be regarded as "serious." The intake notes imply a possible "broken bones" standard. The fact that the respondent carries a gun on a regular basis might be regarded as an ongoing threat. The mention of previous violence certainly suggests that the behavior is repetitive.

Although many mediators agree that wife abuse is a serious problem, that mediation is appropriate in some but not all domestic violence cases, and that the more serious cases should be prosecuted, other proponents of mediation find law enforcement inappropriate in abuse cases because they believe that both the victim and the offender are at fault. Paul Rice explains that mediation is preferable to prosecution in intrafamily abuse cases

[b]ecause both parties may be culpable when an entire dispute or relationship is considered Punitive action against a single party for an isolated act is counterproductive, and diminishes the confidence and respect that are essential for a successful criminal justice system It is important to recognize that the government's goal need not always be to determine fault, to label conduct criminal, and to level blame at any single person. Mediation/arbitration

⁷⁹*Id.*

⁸⁰*Id.* at 24.

programs approach antisocial behavior with this awareness. They emphasize the personal responsibility of each party rather than the narrow assessment of legal fault.⁸¹

Rice favors mediation because he believes that the violence is partly the woman's fault; the neutrality of the justice system would be undermined by filing charges against the offender, thus placing full responsibility on him. Mediation, Rice asserts, is more effective in making each party accept his or her share of the responsibility for the violence.

Proponents of the law enforcement model, on the other hand, believe that abuse is the responsibility of the abuser, and therefore that the remedy must compel him to accept that responsibility. Evan Stark and Anne Flitcraft, two researchers on wife abuse, write that "the battering syndrome uniformly grows out of and reinforces the unequal power relations between men and women."⁸² Violence against women by their mates is usually repetitive in nature and escalates over time.⁸³ The abuser frequently employs violence to coerce his mate to comply with his demands and to recognize his authority over her activities.⁸⁴ In many relationships, the man becomes violent when the woman attempts to move out of her traditional role by finding a job or asking for assistance with household or childrearing responsibilities. Violence is the man's attempt to maintain the status quo.⁸⁵ If mediators accepted these assertions — that wife abuse is repetitive, escalating, and inherently coercive — then most abuse cases would fail the screening criteria mentioned above and those of many other mediation programs.

Mediators often distinguish between cases susceptible of informal resolution and those which must be formally dealt with by the legal system by evaluating the seriousness of the violence and of the injuries inflicted. Most law enforcement agencies also tend to distinguish cases based on the "seriousness" of the violence involved. Police classify assaults between intimates as less

⁸¹Rice, *supra* note 54, at 22-23.

⁸²WIFE ABUSE IN THE MEDICAL SETTING, *supra* note 15, at 4.

⁸³See *supra* notes 21-22 and accompanying text.

⁸⁴See R. DOBASH & R. DOBASH, *supra* note 9, at 23-24 ("The use of physical force against wives should be seen as an attempt on the part of the husband to bring about a desired state of affairs.").

⁸⁵S. SCHECHTER, *supra* note 21, at 219-24 (1982).

serious than assaults between strangers,⁸⁶ and make very few arrests in domestic cases because they conclude that they have no power to do so.⁸⁷ Nancy Loving, of the Police Executive Research Forum, reported that seventy percent of 130 police officers interviewed said that lack of serious injury was a factor in their decision not to arrest in abuse cases.⁸⁸ Also, prosecutors frequently decline to file charges because, in their view, the injuries inflicted are not serious enough.⁸⁹

But what is a serious injury? Many abusers inflict injuries only in places covered by clothing or hair, where the bruises will not show. Some abusers use rubber instruments which inflict internal injuries but will not leave surface bruises. And who is to judge whether the injury is serious enough to necessitate a serious remedy? Should the woman be asked to undress during her intake interview, or be required to have a medical examination before she initiates legal action? More fundamentally, using the extent of injuries to decide on the required course of legal action assumes a correlation between the level of injury inflicted in a particular battering incident and the level of trust or cooperation between the parties. It assumes that the level or frequency of violence in a relationship may be judged by the extent of injuries inflicted in one incident.

Classifying cases by level of injury is evidently useful to mediators and other service-providers in assigning battered women to one legal process or another.⁹⁰ The sheer number of cases may make more precise screening difficult. However, mediation programs which fail to perceive the seriousness of a violent situation by relying on simplistic assessments of injuries inflicted, may accept inappropriate cases for mediation.

⁸⁶See RULE OF THUMB, *supra* note 36, at 21-22; VERA INSTITUTE OF JUSTICE, *supra* note 49, at 31-36.

⁸⁷N. LOVING, RESPONDING TO SPOUSE ABUSE & WIFE BEATING: A GUIDE FOR POLICE 42 (1980).

⁸⁸*Id.*

⁸⁹See PROSECUTION OF SPOUSE ABUSE, *supra* note 62, at 13-24.

⁹⁰In 1981, for example, I visited a legal center for abused women in Philadelphia which each year handles requests for legal assistance from 4000 battered women. One of my tasks was to recommend ways to manage their unwieldy caseload. Several of the over-worked staff believed that some screening criteria must exist which would help them to recognize those women who really needed help or would benefit from legal protection. They resisted any implication that *all* of the women who called the center genuinely needed help. These manifestations of overload and burnout are common problems, both in programs which provide high quality services to abused women and in offices where aiding abused women is only one of many responsibilities.

2. The sanctity of the family

The use of mediation to remedy family violence is one contemporary expression of a traditional policy that the state should not intervene in husband-wife conflicts, because the family is "a private ordering system with a capacity for solving its own disputes."⁹¹ State intervention to stop wife abuse would deprive the patriarch of his authority within the family unit. For example, Blackstone wrote that, "as [the husband] is to answer for her misbehavior, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children"⁹² Although the states later rejected this rule, the underlying policy forbidding state intervention in private family matters survived.⁹³

Explicit recognition of patriarchal authority was replaced at the end of the nineteenth century by legal acknowledgement of families as sacred, delicate entities which should be preserved at all costs.⁹⁴ Despite the rising divorce rate and increasing social acceptance of single adulthood and sequential marriages, theorists continue to justify state inaction with regard to intrafamily crime, and to encourage private resolution of violent disputes which, if they occurred between strangers, would be treated as a state responsibility.⁹⁵

⁹¹Frank Sander, Professor of Law, Harvard Law School, speaking at the ABA National Conference on Alternative Family Dispute Resolution, Washington, D.C., June 1982, quoted in *Mediation: The Family Connection*, 68 A.B.A. J. 783 (1982).

⁹²W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND Book I, Ch. XV, 444 (1765-69). See also *State v. Black*, 60 N.C. 262 (1 Win. 266) (1824), in which a judge declined to penalize a man for choking his wife, stating that:

[T]he law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself; and unless some permanent injury be inflicted, or there be an excess of violence, or such a degree of cruelty as shows that it is inflicted to gratify his own bad passions, the law will not invade the domestic forum, or go behind the curtain.

Id. at 263.

⁹³One court, although declaring wife abuse illegal, said: "If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive." *State v. Oliver*, 70 N.C. 60, 61-62 (1874).

⁹⁴One judge wrote in 1889 that "judicial inquiry into matters . . . between husband and wife would be fraught with irreparable mischief, and [is] forbidden by sound considerations of public policy." *Miller v. Miller*, 78 Iowa 177, 182, 42 N.W.2d 641, 642 (1889).

⁹⁵See, e.g., Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971); Sander, *supra* note 53.

Proponents of mediation often justify limited intervention in family problems with arguments that reflect an unrealistic view of family life. Lon Fuller, for example, characterizes husband-wife conflicts as so trivial or personal as to be above formal intervention:

[T]he internal affairs of the marriage have generally been thought to be inappropriate material for regulation by a regime of formal act-oriented rules, whether imposed by law or by contract. There are, for example, no laws in the books prescribing which spouse is responsible for helping the children with their school work or allocating between husband and wife the right to invite their respective relatives to make weekend visits.⁹⁶

Fuller urges that marriage not be governed by formal rules because imposing such rules "would be destructive of the spirit of mutual trust and confidence essential for the success of a marriage";⁹⁷ he also suggests that married life is too complex and variable to be formally regulated.⁹⁸

Although Fuller is wary of regulation of marriage in general, he does support state policy which attempts to keep marriages together and which imposes barriers to dissolution. Specifically, he proposes that courts refer cases to mediators before granting divorces, and that the mediators attempt to reconcile the parties to test whether there has been an irretrievable breakdown in the marriage.⁹⁹

Frank Sander similarly suggests that marital problems are amenable to mediation because people in long-term relationships are better able to deal with the problems underlying the overt dispute and to work out solutions to those problems than are strangers or disputants who know each other less well.¹⁰⁰ He also points out that mediation of family problems is consistent with "a traditional aversion to judicial involvement in the going family, except where it is compelled by considerations of health or safety."¹⁰¹

⁹⁶Fuller, *supra* note 95, at 330.

⁹⁷*Id.* at 331.

⁹⁸*Id.*

⁹⁹*Id.* at 333.

¹⁰⁰Sander, *supra* note 53, at 120, 122.

¹⁰¹*Id.* at 122.

This essentially romantic view of marriage leads to policy proposals which fail to take account of marriages in which mutual trust is unknown and act-oriented rules are needed to protect women from assaults by their husbands. The law enforcement model of intervention in wife abuse cases is based on assumptions about the nature of the family different from those made by mediators. Many advocates for battered women believe that the goal of intervention is neither to keep families together nor to break them apart, but to provide victims of abuse with additional resources which will ensure their safety. They emphasize empowering women to make their own decisions, not to make them dependent on service-providers. Some women decide to terminate abusive relationships; some prefer to try to continue the relationship and stop the violence. Much feminist advocacy for abused women aims to increase women's choices, and to give them greater control over their own lives.¹⁰²

The view of marriage as a close, private, permanent unit in which there is universal trust and willingness to compromise is not a sound model to use in designing services for people seeking help with marital problems. One legal services office found that half of the women who came in seeking a divorce had been battered.¹⁰³ The very need for help in these relationships indicates a dearth of the intimacy and trust needed for effective mediation.

3. The "draconian" criminal justice system

A third area in which the assumptions made by proponents and critics of mediation diverge concerns the nature of the criminal justice system and the consequences of formal legal action. Proponents characterize mediation as a humanitarian alternative to more formal procedures.¹⁰⁴ In discussing formal legal remedies, such as divorce litigation¹⁰⁵ and criminal prosecution, used in resolving family problems,¹⁰⁶ proponents of mediation often exaggerate the inhumane aspects of these court remedies.¹⁰⁷

¹⁰²See S. SCHECHTER, *supra* note 21, at 60, 290.

¹⁰³Fields, *Representing Battered Wives, Or What To Do Until the Police Arrive*, 3 FAM. L. RPTR. (BNA) 4025, 4025 (1977). A British study of over 1500 divorce cases found that 90% of the women mentioned battering as one reason for seeking divorce. See *infra* note 170.

¹⁰⁴Crouch, *supra* note 52, at 219.

¹⁰⁵See Winks, *supra* note 74, at 616-34.

¹⁰⁶Bethel & Singer, *supra* note 3, at 23-24.

¹⁰⁷Bethel and Singer characterize the case described above at text accompanying notes

The pro-mediation rhetoric fails to acknowledge that an adversary proceeding is often the best way to protect the rights of the parties. The criminal justice system has the power to intervene on behalf of a weaker party to punish or to deter subsequent criminal conduct. Moreover, contrary to many mediators' assertions, some law enforcement agencies have adapted their practices to make prosecution more available to and a more viable remedy for victims of domestic abuse.¹⁰⁸

Generally, proponents and opponents of domestic violence mediation are in partial agreement about the weaknesses of the criminal justice and domestic relations systems and the inadequacy of the remedies currently offered to abused women.¹⁰⁹ They differ, however, in their perceptions of what abused women need, what will stop violence, and how best to respond to the weaknesses in the existing law enforcement system. Most advocates for battered women insist that the criminal law must be enforced equally in crimes involving strangers and in intrafamily crimes, and urge law enforcement agencies to change their policies to ensure that women are better protected.

The battered women's movement does considerable work within established law enforcement agencies. By reversing institutional neglect of wife abuse cases, advocates hope to foster community responsibility for stopping violence against women and to achieve changes more durable than any advances which could be achieved by working outside the system.

Advocates for abused women have proposed legislation granting new powers to courts and law enforcement agencies and imposing new duties on them in wife abuse cases.¹¹⁰ They have initiated lawsuits against police departments and other law enforcement officials for failure to protect battered women,¹¹¹ and have conducted training of law enforcement officials, health

77-79 as "precisely the kind(s) of case(s) for which prosecution may be too draconian a remedy," and extoll mediation because it will not "brand the respondent as a criminal" *Id.* at 24.

¹⁰⁸See generally PROSECUTION OF SPOUSE ABUSE, *supra* note 63.

¹⁰⁹Compare, e.g., Rice, *supra* note 54, at 17-20 with Fields, *Wife Beating: Government Intervention Policies and Practices*, in ISSUES OF PUBLIC POLICY, *supra* note 42, at 228-29, 249, 256-57, 272, 276-78.

¹¹⁰See *State Legislation Survey*, *supra* note 61, at 271.

¹¹¹See *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (App. Div. 1978); Woods, *supra* note 65.

professionals, and social service workers.¹¹² In addition, approximately 500 shelters for battered women have been established,¹¹³ most of them operating independently of existing social service agencies.

In contrast, proponents of mediation would completely remove wife abuse cases from the law enforcement system, and offer an alternate process. The mediators' approach to an unresponsive legal system is not to attempt to change it, but rather, to work outside of it. The fundamental question raised by feminists is whether the "soft" remedy of mediation can be effective in stopping domestic violence.

B. Questioning the Efficacy of Mediation

The Police Foundation conducted one recent study of mediation and other responses to wife abuse cases, which attempted to determine whether police should use law enforcement procedures or social work techniques in responding to "disturbance" calls.¹¹⁴ This study employed the varying responses of arrest, informal mediation, or temporary separation of the parties in actual cases to ascertain the efficacy of each method in deterring subsequent assault. The participating officers were divided into three groups; in answering the abuse calls that fit the research criteria, one-third made arrests, one-third separated the parties, and one-third mediated the disputes. A six-month follow-up survey revealed that there had been a recurrence of violence in 24% of the cases in which the police had separated the parties for eight hours, a 17% recurrence in cases which were mediated, and only a 10% recurrence of violence in cases in which an arrest was made.¹¹⁵

¹¹²See generally S. SCHECHTER, *supra* note 21.

¹¹³See *supra* note 28.

¹¹⁴L. Sherman & R. Berk, *Police Responses to Domestic Assault: Preliminary Findings* (1983) (Police Foundation Working Paper).

¹¹⁵*Id.* at 7. The researchers found the data on arrest and separation to be statistically significant, and the data on mediation "close" to being statistically significant. *Id.* at 8. One weakness in the study was that the "mediation" attempted by the officers varied widely, ranging from a lengthy discussion with the parties to a cursory conversation and a referral. *Id.* at 9.

As of 1977, seventy percent of the nation's police departments with 100 or more officers were training police in "crisis intervention" response, urging that an officer's primary response to domestic abuse should be mediation rather than arrest.¹¹⁶ The Police Foundation report, with its demonstration of the dramatic deterrent effect of arrest, may spark a major shift in police policy away from crisis intervention and toward more traditional law enforcement.

During the 1970's, community-based mediation programs called Neighborhood Justice Centers were started by the Law Enforcement Assistance Administration and were extensively evaluated to determine the effectiveness of their service.¹¹⁷ About half the caseload of the Neighborhood Justice Centers consisted of "interpersonal disputes in domestic, neighbor, family and other close relationships"¹¹⁸ The evaluation, although generally positive regarding the effectiveness of mediating "minor interpersonal disputes,"¹¹⁹ found that effective resolution was more likely to be achieved through mediation of simple disputes than of more complex ones.¹²⁰ At one Center in Brooklyn, agreements between disputants in intimate relationships were observed to be *four times* more likely to break down than agreements between parties with more casual relationships. The report suggested some reasons for this pattern in the failure of mediation:

[I]t is probably true that in most of the cases which are resolved the dispute is not tremendously complex or deeply rooted [T]he resolvable dispute is typically one which requires only the relatively brief intervention of a skilled third party. This view is supported by the evidence . . . which shows that when the dispute involves individuals with strong ongoing bonds or . . . underlying problems, the likelihood of achieving a lasting resolution diminishes.¹²¹

¹¹⁶*Id.* at 4. See Boffey, *Domestic Violence: Study Favors Arrest*, New York Times, Apr. 5, 1983, at C1, col. 1.

¹¹⁷NJC EVALUATION, *supra* note 46.

¹¹⁸*Id.* at 22.

¹¹⁹*Id.* at 106.

¹²⁰*Id.*

¹²¹*Id.* at 89. This result undermines Frank Sander's rationale for mediating marital disputes. See *supra* text accompanying notes 100-101.

C. The Goals of Mediation

The stated goals of most mediation programs sound relatively innocuous whether applied to wife abuse or to any other problem. Upon close examination, however, they emerge as fundamentally contradictory to the goal of stopping violence in a relationship. In general, mediation programs aim to reach agreement in a maximum number of cases and to prevent those cases from going to court for more formal proceedings. Some mediators explicitly try to reconcile the spouses with whom they work, and to increase the chances that the marriage will remain intact.

Many proponents of the law enforcement model believe that family violence is perpetuated by keeping the problem behind closed doors, and by relegating victims to agencies which encourage abused women to stay with their husbands. They assert that more effective remedies would bring the problem into public fora, hold the abusive party responsible for his violent behavior, and make clear that society will punish him if the violence continues. The discussion below outlines the goals of the mediators and the responses of pro-law enforcement critics.

1. To reach an agreement

As prosecutors often measure their success by their conviction rates, mediators often evaluate their facility in working with disputants by whether an agreement is reached. Although some mediators acknowledge that certain cases cannot and should not be mediated,¹²² other mediators state that the basic goal of engaging two disputants in a hearing is to reach an agreement.¹²³

When two people in an abusive relationship confront their feelings about the violence, they are unlikely to agree about either the causes of the violence or the solutions. In fact, since abusers tend not to acknowledge their own assaultive behavior, even to

¹²²Winks, *supra* note 74, at 644, states: "The mediator must recognize those situations which can be resolved only by representatives of the parties, and not try to gloss over profound differences with false amicability."

¹²³See, e.g., RULE OF THUMB, *supra* note 36, at 71; Laszlo & McKean, *supra* note 50, at 348.

themselves, they are unlikely to agree even about the occurrence or severity of any incident that has taken place.¹²⁴

Many people in violent relationships will present a wide array of problems to the mediator in addition to the issue of violence. These subsidiary problems might include such matters as child visitation schedules, financial problems, or time spent with other friends or lovers.¹²⁵ When the goal is simply to reach an agreement, mediators often focus on those issues which are more susceptible to compromise, thinking that resolving some problems may initiate resolution of the others. Often, however, the agreement does not reach the issue of violence, or addresses it only in euphemistic terms.¹²⁶ If the issue of violence is so explosive or so delicate that the parties cannot discuss it with the mediator, then the problem is neither "minor" nor easily resolvable.

When the issue of violence is ignored and an agreement is reached on other issues, the victim, who initiated these efforts to obtain protection from further violence, has been channeled into a system in which no one talks about the violence, and which produces a document unresponsive to her most pressing problem. In choosing mediation, she has often opted out of other relief. When mediation fails to address the abuse problem, she may feel alienated from the legal system and reluctant to seek another remedy.

2. To reconcile the parties

Some mediators reject criminal prosecution of spouse abuse because it "acts to further divide the already dismembered family unit";¹²⁷ they view mediation as more likely to result in a reconciliation of the parties. Some proponents of mediation acknowledge that the process can facilitate an amicable separation,¹²⁸ but, more commonly, mediators define resolution of problems as

¹²⁴See A. GANLEY, *supra* note 10, at 28.

¹²⁵*Id.* Ganley argues that until the violence is directly addressed, communication cannot possibly be effective, even as to so-called subsidiary problems. *Id.*

¹²⁶See *infra* text accompanying notes 174-80.

¹²⁷Laszlo & McKean, *supra* note 50, at 330.

¹²⁸See, e.g., Fuller, *supra* note 95, at 308.

maintaining the relationship, increasing cooperation, facilitating communication, and stressing areas of agreement.¹²⁹

Mediation which glosses over the issue of violence and simultaneously encourages the victim to maintain her relationship with the abuser, plays a direct role in perpetuating the violence. This institutional responsibility for wife abuse has been described as follows:

In a way the entire community . . . is responsible for the continued assaults on women and in some cases their deaths: the friends and neighbors who ignore or excuse the violence, the physician who does not go beyond the mending of bones and the stitching of wounds, the social worker who defines wife beating as a failure of communication, and the police and court officials who refuse to intervene. The violence is meted out by one man but the responsibility for that violence goes far beyond him.¹³⁰

Those who are sought out by women in need of protection, who have the power to help, and who do not use that power, are therefore partly responsible for subsequent violence. Several public officials have been sued for failure to offer protection to abused women which might have prevented subsequent violence.¹³¹ Other officials, recognizing the causal link between their nonintervention and the continuing violence, have voluntarily adopted stronger stances against wife abuse. In Anchorage, Alaska, for example, the District Attorney recently adopted a policy prohibiting dismissal of charges at the request of abused women who were complaining witnesses. The new policy was announced immediately after two battered women, whose cases had just been dismissed, were killed by their mates.¹³²

¹²⁹See, e.g., Bethel & Singer, *supra* note 3; Laszlo & McKean, *supra* note 50.

¹³⁰R. DOBASH & R. DOBASH, *supra* note 9, at 222.

¹³¹See, e.g., Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss, *Buckhannan v. Miami*, No. 80-14930 (Fla. Circ. Ct. March 30, 1981) (abused woman sued police for wrongful death because they failed to arrest her husband during two responses to her residence in one evening, and she shot him in self-defense because she had no other protection).

¹³²Riley, *Spouse-Abuse Victim Jailed After No-Drop Policy Invoked*, NAT'L L.J., Aug. 22, 1983, at 4, col. 1, 35, col. 2.

Mediators who advocate reconciliation of parties in violent relationships respond more directly to the desires of the abuser than to the needs of the victim. Some women want to maintain their relationships although they demand cessation of the violence; others want to terminate their relationships. The man, however, usually wants the relationship to continue, and desires to maintain the status quo within that relationship.¹³³ Because mediation usually satisfies his demands, the abuser may appear more cooperative than the victim during mediation sessions. The victim may acquiesce in an unsatisfactory "resolution" under the pressure of her mate and the gentle guidance of the mediators.

3. Recognition of mutual responsibility

Commonly used mediation techniques are based on the theory that disputes are most successfully resolved if the mediator can persuade each party to acknowledge his or her contribution to the problems, and to make a commitment to change his or her behavior to avoid those problems in the future. Regardless of the issue presented, the disputants are accorded mutual responsibility. The District of Columbia program,¹³⁴ for example, is "not concerned with rights and wrongs The mediator . . . rebuffs requests to make findings of fact or decisions about blameworthiness" but instead encourages "courteousness" and tries to set an example of respectful behavior.¹³⁵ Similarly, Paul Forgach, supervisor of the mediation program in the Pima County, Arizona District Attorney's office stated in hearings held by the Civil Rights Commission that in mediating abuse cases, "[w]e're not looking to determine who is guilty or innocent."¹³⁶

Many mediators are comfortable with encouraging each party to recognize how he or she contributes to the violence because they believe that, even if the man is the sole violent actor, the woman provoked him and is, therefore, jointly responsible. For example, two mediators assert that "[o]ften in family violence, it is difficult to determine to what extent the victim has contributed

¹³³A. GANLEY, *supra* note 10, at 31.

¹³⁴The District of Columbia Mediation Service is described in Bethel & Singer, *supra* note 3, at 25-29.

¹³⁵*Id.* at 17-18.

¹³⁶RULE OF THUMB, *supra* note 36, at 71.

to her own victimization. It is particularly in these victim-offender interactions that diversion through mediation is appropriate."¹³⁷

This approach responds more to the needs of the abuser than of the victim, by allowing both the abuser and the victim herself to blame the victim for the continued violence. By relieving the abuser of responsibility for his own violence, mediation programs grant abusive men tacit permission to continue their violent behavior.¹³⁸ This "blame-avoidance" policy discourages the parties from dwelling on past events and encourages them to focus on plans for their future behavior.¹³⁹ Some mediators recognize that past behavior must be discussed because people need to vent their anger with each other, but they see this as appropriate only because it may help to control future conduct.¹⁴⁰

The prospective focus of the mediation hearing deprives abused women of any redress for the past wrongs they have suffered. Because abusers are prone to deny their abusive behavior, it is not clear whether a man can make a meaningful promise to stop the violence unless he has fully acknowledged that he has been violent in the past.¹⁴¹ A legal services lawyer in Arizona summarized her perception of the consequences of this prospective focus on her clients:

You just talk about future conduct

So, the message that the battered woman gets in this mediation program is . . . that . . . "Your husband will not be punished for this activity [S]ociety does not think this serious enough to treat it as the criminal act that it really is under our laws." So the message to the man is, "Keep on doing it, you know, nobody is going to punish you for this. You can get away with it."¹⁴²

¹³⁷Laszlo & McKean, *supra* note 50, at 328-29.

¹³⁸RULE OF THUMB, *supra* note 36, at 71-75.

¹³⁹This is true of the Pima County program, *id.* at 71, and of the District of Columbia program, Bethel & Singer, *supra* note 3, at 17.

¹⁴⁰Bethel & Singer, *supra* note 3, at 17.

¹⁴¹See generally A. GANLEY, *supra* note 10.

¹⁴²RULE OF THUMB, *supra* note 36, at 72. Abused spouses often comprehend the dilemma in which they are placed by mediation. One judge, testifying at the Civil Rights Commission hearings, described battered women as "want[ing] to have some sort of final say-so to the offending spouse, to threaten that if they ever do it again, the judge would throw them in jail or whatever." Testimony of Judge Golden Johnson, *quoted in id.*, at 75.

4. Relative costs

A common goal of mediation programs set up by courts or agencies connected to the courts is to remove as many criminal or domestic relations cases as possible from overcrowded court dockets.¹⁴³ Originally, mediators hoped that informal case processing would be less expensive, but recent research has shown that mediation may cost as much as adjudication.¹⁴⁴ Proponents of mediation assert that even if its cost is not dramatically less, a mediation program "can make extensive use of volunteer workers and does not draw upon the scarce resources of the legal system."¹⁴⁵

One author proposes mediation of family violence cases primarily to solve caseload problems in the criminal justice system. He proposes that criminal charges not be filed in any domestic abuse cases and that mediation be used as the exclusive remedy for domestic violence. Mediation, he states, is preferable because it could "reduce the level of tension between the participants" and "creat[e] a sense of satisfaction."¹⁴⁶

Prosecutors, judges, and court clerks regard abuse cases as the least desirable of the cases brought before them, and they therefore treat these cases as falling outside of their jurisdiction or as interfering with their "real" work.¹⁴⁷ One commentator writes that "if charging occurred in all of these [abuse] cases, officials believe that an inordinate amount of resources would be expended in attempting to control infractions of a relatively minor nature."¹⁴⁸ Another author, explaining why so few charges are filed in spouse assault cases, states that "in some cases the detective may determine that the infraction was minor and that both parties were equally guilty . . . this normally is the result when a husband has assaulted his wife but the injury is not serious and it appears that

¹⁴³Laszlo & McKean, *supra* note 50, at 348 (discussing Columbus Night Prosecutor's Program).

¹⁴⁴Bethel & Singer, *supra* note 3, at 15 (citing NJC EVALUATION, *supra* note 46, at 107).

¹⁴⁵Bethel & Singer, *supra* note 3, at 15.

¹⁴⁶Rice, *supra* note 54, at 20, 22.

¹⁴⁷VERA INSTITUTE OF JUSTICE, *supra* note 49, at 267.

¹⁴⁸Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52, 57-58 (1967).

there was 'good cause' for him to do so."¹⁴⁹ The mediators play on these prejudices of the criminal justice system, and inadvertently collude with law enforcement agencies to bar abused women from access to court remedies.

D. Structural Problems of Mediation

Abuse cases can be successfully resolved (that is, the violence can be stopped) in a number of different fora. Sometimes legal action designed to prevent violence or to rehabilitate the offender is more effective than directly punitive action, especially if the parties want to maintain their relationship. Action in civil court may be less threatening, and therefore more accessible to victims of abuse. On the other hand, some abusers will not respond seriously to any civil action but are effectively intimidated by criminal charges.

Although ambivalent about working with a legal system which is often unreceptive to feminist values and priorities, battered women's advocates have moved toward a loose consensus that law enforcement is valuable. They agree that remedies are more likely to be effective if they lay clear responsibility for the violence on the abusive party, let him know that serious consequences will flow from repeated violence, and follow through on that threat when further violence occurs.¹⁵⁰ Remedies are believed to be most effective if the system provides assistance and protection to the women during and after the legal proceedings and tailors its remedies to the needs of the victim on a case-by-case basis. Finally, the battered women's movement favors remedies which focus on abuse as the primary issue, and address other problems, such as visitation and property issues, in the context of avoiding continued abuse.¹⁵¹

Measured against these criteria, mediation emerges as perhaps

¹⁴⁹F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH CRIME 269 (1969).

¹⁵⁰See *supra* text accompanying note 60.

¹⁵¹See S. SCHECHTER, *supra* note 21, at 174-83; Fields, *supra* note 109, at 228. This consensus can be seen in the recent legislation creating new legal remedies for abused women in over 40 states. See generally *State Legislation Survey*, *supra* note 61.

the weakest of available formal legal remedies.¹⁵² First, mediation programs frequently accept abuse cases which are serious enough to warrant formal action.¹⁵³ Despite evidence of serious threats or violence, some abuse cases are mediated without reference to the violence. Many abused women will not raise the issue of violence unless asked, and are reluctant to discuss the problem in the presence of their mates. Service providers often neglect to inquire about battering when the information is not volunteered by the parties.¹⁵⁴

A second structural problem is that most mediation hearings are conducted in private. Records, if maintained, are usually confidential. There are often no procedural guarantees of public accountability for what transpires during the hearings. Mediators lack the pressure of public scrutiny to insure integrity and consistency in their handling of cases. One mediation proponent urges that hearings be conducted in public because "[p]rivate hearings . . . may lack the ritual and symbolism necessary for both public and private acceptance of the process and its outcome."¹⁵⁵

Third, most mediation programs provide only one session for each pair of disputants.¹⁵⁶ This meeting may last an hour or a few hours; within that time problems must be identified and decisions made about what, if anything, can be done to resolve them through a voluntary agreement. Thus, although mediators often argue that abuse cases are too complex to be prosecuted formally,¹⁵⁷ cases accepted for mediation are treated as "simple" enough to be resolved in half a day.

The fourth structural problem of some mediation programs is that hearings are conducted with both parties present throughout,

¹⁵²Other ineffective remedies include peace bonds and oral injunctions prohibiting abuse or molestation during divorce or other domestic relations proceedings. Like mediation, they lack any enforcement procedures.

¹⁵³See *supra* text accompanying notes 77-79.

¹⁵⁴No research has demonstrated this point in regard to mediation, but a pattern of the failure of hospital emergency room personnel to identify battering cases has been documented. WIFE ABUSE IN THE MEDICAL SETTING, *supra* note 15, at 7. Anecdotal evidence suggests that this same pattern of failure to identify abuse cases occurs in all large service agencies to which abused women go for help. *Id.*

¹⁵⁵Rice, *supra* note 54, at 25.

¹⁵⁶Bethel & Singer, *supra* note 3, at 26.

¹⁵⁷Rice, *supra* note 54, at 22.

and neither is privately interviewed by the mediators.¹⁵⁸ Some mediators believe that they would engender the distrust of each party by speaking to the other in private. Other programs, however, recognize that it is necessary to conduct private interviews in abuse cases because the victim may be afraid to talk about the violence in the presence of the abuser.¹⁵⁹

A fifth issue is that most programs that routinely mediate domestic violence cases do not provide advocates for the parties and sometimes prohibit representation by an attorney or another advocate in a mediation hearing.¹⁶⁰ Battered women are often poorly equipped to assert their own needs, especially in the presence of the abuser. Advocates may delay the process of reaching an agreement, because the advocate may be more reluctant than the victim to gloss over serious issues. In some cases, however, it is appropriate and necessary to slow down the process. Moreover, depriving the parties of the right to counsel in a mediation hearing may consign them to an unknowing waiver of their rights.¹⁶¹ If the mediator is a lawyer, a host of ethical issues are raised for the lawyer,¹⁶² but few constraints are imposed on more informal mediation programs.

A sixth structural problem with domestic abuse mediation programs arises if the victim is required to forego simultaneous or subsequent pursuit of more formal remedies as a condition of participation in mediation. In some programs, election of remedies is not mandatory, but the victims are not offered information about other legal options. The authors of one article promoting use of mediation in domestic abuse cases discuss programs in which mediation is initiated after criminal charges are filed and is conducted in lieu of prosecution. In many of the programs

¹⁵⁸This includes the Pima County program, whose director stated that "everyone remains in the room until the meeting ends." *RULE OF THUMB*, *supra* note 36, at 71.

¹⁵⁹*See* Bethel & Singer, *supra* note 3, at 19-20.

¹⁶⁰My experience at the Complaint Center with Mrs. Carson is illustrative. *See supra* text accompanying notes 5-6. In other types of mediation such as labor negotiations, which fall outside the private family realm, however, mediation is often conducted completely by the parties' attorneys.

¹⁶¹Many of the women who called the Women's Rights Clinic at Antioch after being referred to mediation knew that they had to go back to the Complaint Center for a hearing but did not know what type of hearing and did not understand the consequence of the choice they had made to pursue informal action rather than Court remedies.

¹⁶²*See generally* Crouch, *supra* note 52; Silberman, *supra* note 51.

discussed, the mediated agreement is the offender's ticket to dismissal of the charges against him.¹⁶³ A few of the programs do not drop the charges immediately but keep the file open pending good behavior. Serious monitoring of the offender rarely occurs during that period.¹⁶⁴

Diverting cases from prosecution to mediation amounts to tacit decriminalization of wife abuse. This is evidenced by standard procedures followed in some of the programs. The Boston Urban Court Program, for example, "accepts referrals of both felony and misdemeanor cases. However, in order for the court to take jurisdiction over the case, the felony charge must be reduced to a misdemeanor."¹⁶⁵ This program mediated one case in which a man had picked up a knife and threatened to cut his wife's head off, and one in which a shod foot was denominated a dangerous weapon for charging purposes because it was used to kick a woman in the head repeatedly.¹⁶⁶

At the Community Mediation Center in Coram, New York, the forms used for agreements in spouse abuse cases contain the following boilerplate: "The parties to this agreement do hereby withdraw all criminal charges brought against one another prior to this date."¹⁶⁷ The forms also stipulate that the parties will release each other from any liability resulting from the dispute and will come to the mediation center for assistance before taking any court action if there are further problems.¹⁶⁸ Although the language is that of a mutual agreement, it is the victim of abuse who is persuaded by the mediators to drop the charges against her husband.

A final structural problem with mediation as a remedy for wife abuse relates to program financing. Administrators have an institutional investment in presenting "their" remedy as effective for the largest group of cases. Most mediation programs are relatively new, and operate on year-by-year grants from government or private agencies.¹⁶⁹ The program administrators are required to

¹⁶³See generally Laszlo & McKean, *supra* note 50.

¹⁶⁴*Id.*

¹⁶⁵*Id.* at 347.

¹⁶⁶*Id.* at 346.

¹⁶⁷Sample agreements distributed by the Community Mediation Center, Coram, New York.

¹⁶⁸*Id.*

¹⁶⁹See *supra* note 58.

present data proving the effectiveness of their work to preserve their jobs for the coming year. This economic pressure prevents many mediators from being sufficiently sensitive to the special problems posed for abused women by mediation. This institutional investment also afflicts private attorneys who are trained as mediators. Women seeking divorces because of domestic violence form a significant part of the mediation-consumer population.¹⁷⁰ One attorney who authored an article extolling divorce mediation reveals in the following statement the depth of her investment in making mediation work:

If mediation is to be limited to a small band of highly sensitive attorneys and well adjusted clients, it can scarcely be proffered as a useful alternative to current divorce procedures. Rather than dismissing some lawyers and some clients as poor candidates for the mediation process, it is more fruitful to think of what could be done to make them better.¹⁷¹

Other proponents of mediation demonstrate greater awareness that this remedy does not suit all cases. They may try to solve the problem through the use of screening criteria, but these screening standards are often amorphous and are not consistently applied.¹⁷² One commentator succinctly describes the distortion in the perceptions of many mediators regarding the effect of mediation:

As it is taught today, mediation theory is characterized by the underlying assumption that all issues can and must be compromised. However, there can be cases imagined

¹⁷⁰One study of over 1500 divorce cases in a large English city between 1966 and 1968 found that physical abuse was the reason most frequently given for seeking divorce. More than 90% of the women listed abuse as one ground for divorce and most indicated that there had been recurrent violence. R. DOBASH & R. DOBASH, *supra* note 9, at 18. Chester & Streather, *Cruelty in English Divorce: Some Empirical Findings*, 1972 J. MARRIAGE AND FAM. 706, 709.

¹⁷¹Winks, *supra* note 74, at 644.

¹⁷²For example, in articulating "essential principles" to guide mediation programs, Bethel and Singer state that "[w]hatever case intake method is used must provide careful screening of complaints. Those cases suitable for mediation should be identified and preserved, and others should be referred to appropriate legal or social agencies." Bethel & Singer, *supra* note 3, at 31.

wherein this is simply irrational. It could be that the compromiser role requires that one make peace with oppression, suffer fools gladly, redefine black as white, and meet utter nonsense halfway.¹⁷³

E. The Mediation Agreements

The weakness of mediation as a remedy for abused women is evident in the agreements which result from mediation hearings. This section will discuss aspects of the agreements which make them ineffective in stopping violence.

Mediation agreements commonly either fail to address explicitly the issue of violence, or address the issue in euphemistic terms. One study examined forty-eight agreements reached in abuse cases mediated in a program in Dorchester, Massachusetts. Criminal charges had been filed against the abusers in all the cases; prosecution was suspended for mediation, and charges dismissed after a period of compliance with the agreement. The agreements studied addressed the following issues:

<u>Nature of Agreement</u>	<u># of Agreements in which Term Appeared (out of total of 48)</u>
Agree to get along	25
Alcohol counseling	12
No contact	12
Drug counseling	1
Psychiatric counseling	1
Marriage counseling	6
Visitation	6
Financial agreement	11
Employment counseling	2
Restitution	3
Divorce	3 ¹⁷⁴

¹⁷³Crouch, *supra* note 52, at 243.

¹⁷⁴Laszlo & McKean, *supra* note 50, at 340.

None of these items suggests explicit agreements by abusers to stop the violence. Despite the fact that the predominant issue in these cases was violence, the mediators appear to have been more concerned about how the parties “felt” about each other than about how they behaved. The term which most closely approximates a “no violence” promise is the agreement to get along. The researchers suggest that “[t]he category ‘agree to get along’ would seem so vague as to lack meaning, but the further vow to attempt a relationship based on love or at least friendship is an essential first step towards reconciliation.”¹⁷⁵

Laszlo and McKean use the following example to outline the level of detail in the agreement to get along:

On January 23, 1977, Y struck X a number of times requiring her to go to this hospital with injuries to the face and hands. The incident resulted from a conversation X initiated after she had opened the mortgage statement. Y had not paid the bill for two months

The agreement stated that both parties agreed to get along, they agreed to discuss their problems in private and not in front of the children; X agreed not to question her husband about the way he spends the money, not to accuse her husband of seeing another woman, to not inquire [sic] about her husband’s whereabouts with friends. If the agreement breaks down, X will return to court and file for separation. Y agreed to pay more attention to his wife, to spend more time at home, not to see another woman, not to take the children to another woman’s home. The case was continued . . . until August 18, when it was dismissed.¹⁷⁶

The summary of the agreement mentions nothing about the violence. During the hearing, the husband and wife listed things they disliked about the behavior of the other; these characteristics, and not the abusive conduct of the husband, were treated as the underlying problems. The authors acknowledge their belief that “[v]iolence can be prevented easiest [sic] by removing the source of frustration.”¹⁷⁷ In this case the “source of frustration”

¹⁷⁵*Id.*

¹⁷⁶*Id.* at 340–41.

¹⁷⁷*Id.* at 341.

was deemed to include the woman's concern about the financial well-being of her family, her confrontation of her husband about his involvement in an extramarital relationship, and about his exposing her children to this affair, and her request for information about where he went when he went out without her.

The Boston Urban Court Program followed a similar pattern in a case in which charges of assault and battery with a dangerous weapon (the shod foot case)¹⁷⁸ were dismissed after the case was mediated.¹⁷⁹ The agreement made no mention of past or future violence, but simply stated that the parties would have no contact with each other, made arrangements to establish the offender's paternity of the woman's child, and outlined a visitation schedule.¹⁸⁰ In another case mentioned above, in which the man threatened to cut off his wife's head with a knife,¹⁸¹ the agreement was limited to a commitment by the husband to seek alcohol counseling.¹⁸²

Some mediation agreements do explicitly prohibit further violence; they also often include the woman's agreement to avoid the behavior which ostensibly provokes her husband's abusive outbursts. These agreements may be ineffective in preventing domestic violence, because the mediator secures the man's promise of no violence in exchange for the woman's promise of obedience. If, for example, she violates her agreement to have dinner ready on time, the agreement tacitly permits the husband to beat his wife again.

Whether or not the agreements include promises by the abuser to abstain from violence, mediation agreements may offer abused women no real protection. Many programs prefer oral agreements to written agreements,¹⁸³ or accept oral agreements if the parties prefer them.¹⁸⁴ In such cases there is not even a record available to the unfortunate victim who must explain to a police officer or a judge that she has already been through mediation and that the recent incident of violence contravened a previous agreement.

¹⁷⁸See *supra* text accompanying note 166.

¹⁷⁹See Laszlo & McKean, *supra* note 50, at 346.

¹⁸⁰*Id.*

¹⁸¹See *supra* text accompanying note 166.

¹⁸²See Laszlo & McKean, *supra* note 50, at 346.

¹⁸³An example is the Columbus Night Prosecutor's Program, described in *id.* at 348.

¹⁸⁴An example is the the District of Columbia Mediation Service, described in Bethel & Singer, *supra* note 3, at 26.

Even written agreements have no legal force. No penalties may be imposed for violation of a mediation agreement unless court action is taken to give the agreement the force of law.¹⁸⁵ When the violence recurs, the victim may reopen the mediation or seek assistance in another forum, but most agreements cannot be enforced. In the Boston Urban Court Program, for example, no mediation agreement is legally binding. Mediators encourage disputants to contact the program if the agreement is violated.¹⁸⁶ Some programs close their cases when an agreement is reached, and the mediator has no further contact with the parties.¹⁸⁷ The program will not be informed of a violation of a mediated agreement unless the victim reports it. Other programs attempt follow-up contacts with the parties to determine whether the agreement has been violated;¹⁸⁸ in general, contact is not maintained for a long enough period following mediation to obtain reliable data of recidivism.¹⁸⁹

Although the agreements are legally worthless, they are often crafted to look like legal documents. Victims are misled by this practice; they leave a mediation hearing with the illusion of having obtained an enforceable order, only to discover when they are next abused that the agreement offers no legal protection.¹⁹⁰

¹⁸⁵Laszlo & McKean, *supra* note 50, at 344.

¹⁸⁶*Id.*

¹⁸⁷Bethel & Singer, *supra* note 3, at 26.

¹⁸⁸Laszlo & McKean, *supra* note 50, at 344.

¹⁸⁹The Urban Court Program calls parties two weeks after mediation. *Id.* The D.C. Mediation Service conducted a study in which parties were contacted two months after the hearing. Bethel & Singer, *supra* note 3, at 26. Because violent relationships often continue for years or decades, this abbreviated follow-up would be unlikely to identify large numbers of violations. Out of a sample of 68 complainants and 43 respondents recontacted after two months, 19 complainants (28%) and 12 respondents (28%) reported that there had been "further problems" since the agreement. Of those who indicated further problems, four complainants reported assault, four reported harrassment, three reported non-payment, five reported child custody or visitation problems, and one reported problems with the relationship. Of the respondents, none reported assault, two reported harrassment, none reported non-payment, three reported problems with child custody or visitation, one reported a property dispute, and one reported a relationship problem. *Id.* at 28.

¹⁹⁰One legal services attorney explains: "[S]ome of our clients have come away thinking they have an enforceable document in their hand, a contract that is drawn up, and it really isn't." RULE OF THUMB, *supra* note 36, at 72.

V. A CRITIQUE OF THE LAW ENFORCEMENT CRITIQUE

The law enforcement analysis of mediation as a remedy for domestic abuse criticizes the mediators' view of the causes of wife abuse and recommends other remedies as more effective intervention. The critique itself, however, presents some thorny problems.

Many advocates urge that police officers, prosecutors, and judges should protect women through arrest, prosecution, and punishment or rehabilitation of offenders, and argue that cases should not be diverted to mediation or other alternative dispute resolution programs. One problem with this recommendation is that law enforcement agencies often reflect the same social values which have historically prevented effective intervention in abuse cases. In many agencies, practices will not change until different responses are mandated by law, or until official values are changed, through a major turnover in personnel (perhaps an influx of women) or by the slow process of education. Although in theory strong law enforcement may be the best response to wife abuse, in practice it can be difficult to implement. In some communities, where the prosecutors are unwilling to file charges and the mediators are sensitive to the complexity of abuse cases, "weaker" alternatives such as mediation may be potentially more effective than prosecution. On the other hand, if a mediation program is set up as an alternative to prosecution, it may become a "dumping ground" for abuse cases and may ultimately reinforce the poor response of courts and prosecutors' offices.

Furthermore, the law may be enforced in abuse cases in a manner which discriminates against women, poor people, and non-whites. In Anchorage, Alaska, for example, a prosecutor's office recently adopted a policy of vigorous prosecution of spouse abuse cases.¹⁹¹ After this policy was adopted, a victim who refused to testify against her husband was jailed for refusing to cooperate with the criminal justice system.¹⁹² This reaction might be viewed as a form of backlash, in which officials punish some women because others have asserted their rights. It also seems

¹⁹¹See *supra* text accompanying note 132.

¹⁹²Riley, *supra* note 132.

likely that white middle-class males would fare better in confrontations with police or judges than men who are unemployed, non-white, or have a previous criminal record. Spouse abuse could become yet another crime prosecuted only when the perpetrator is a member of a disadvantaged group.¹⁹³

Absent major unanticipated changes in allocation of government funds for law enforcement, domestic violence matters referred for criminal action will be handled by prosecutors who have huge caseloads and who lack the time or the inclination to give careful attention to abuse cases.¹⁹⁴ Although a growing number of police departments and prosecutors' offices have set up domestic violence victim assistance projects, and have undertaken procedures which result in more effective law enforcement,¹⁹⁵ most law enforcement agencies refuse to direct scarce resources to such projects. Without these special programs, a majority of abuse cases will be dismissed prior to disposition. Such dismissal is the current practice in most traditional prosecutors' offices.¹⁹⁶

Critics of mediation often flatly state that there should be no mediation where there has been violence, ignoring these problems with the law enforcement response to domestic abuse cases.¹⁹⁷ Such critics fail to address the question of how existing mediation programs might be restructured to serve the needs of victims of abuse. The next section of this Article outlines some recommendations for incorporating the law enforcement critique into the mediation process.

¹⁹³In Miami, Florida, for example, an excellent spouse abuse program was established in the State Attorney's Office. Attempting to increase arrests of abusers, the program sought a close working relationship with the police. The first police program with which the program developed a liaison was a special unit operating in Liberty City, a poor and largely Black neighborhood. Admittedly, the program did not have sufficient resources to work with every police precinct in the city, much less to handle all the abuse cases. Yet, this structure may have generated uneven law enforcement against non-white spouse abusers. Interviews with staff of Domestic Intervention Program, Miami, Fla., Jan. 1980.

¹⁹⁴This may be less problematic in small communities and in rural settings where the caseload pressure is lower.

¹⁹⁵See PROSECUTION OF SPOUSE ABUSE, *supra* note 63.

¹⁹⁶*Id.* at 35.

¹⁹⁷See *infra* note 199.

VI. RECOMMENDATIONS FOR MEDIATORS

A. Goals

The purpose of the hearing should be to stop the violence.

When a case is mediated in which one party has been physically abused by another, the primary focus of the mediation hearing should be to prevent subsequent abuse. The victim's physical safety should be given a higher priority in discussions than property disputes or other less serious issues. Mediators should not place a high premium on simply reaching an agreement — in fact, it may be more beneficial for parties who cannot come to an agreement on the issue of violence to realize that more formal action is necessary. In addition, mediators must discard the objective of reconciling disputing parties in cases in which violence has occurred, unless the *victim* wants to maintain the relationship. Often the goal of stopping violence is entirely at odds with the goal of reconciliation; to promote reconciliation may simultaneously perpetuate violence.¹⁹⁸

In any case in which physical violence has occurred, the mediator may need to refer the victim (or the abuser) to other services in addition to or instead of mediation. Mediators must be prepared to offer information and referrals regarding shelters and other social services for battered women, about local police and prosecutor practices in "domestic" cases, and about protection orders and other civil legal remedies.

B. Pre-Mediation Procedure

1. Specific criteria should be used in screening cases for mediation.

Some proponents of the law enforcement model suggest that any case in which physical violence has occurred is unsuited to mediation.¹⁹⁹ Others believe that mediation may be appropriate

¹⁹⁸See *supra* text accompanying notes 130–31.

¹⁹⁹Marjory Fields, a legal services attorney in New York and an expert on wife abuse, states that, for a variety of reasons, many of which correspond to the critique stated in this Article, "mediation will not work to stop wife beating." Fields, *supra* note 109, at 251.

in those cases in which the presenting incident marked the first eruption of violence in a relationship. When the violence is less developed, a pattern of abuse has not yet been established in the relationship and the violence is easier to reverse.²⁰⁰

Determining which cases should be mediated depends on how the mediation program is structured. If the program offers only a one-time joint meeting between the parties and a volunteer, and the resulting agreement is unenforceable, the program is not appropriate for abuse cases. If, on the other hand, mediation occurs after criminal charges are filed, and charges are deferred only as long as the abuser complies with the agreement, and compliance is carefully monitored, the program might be better equipped to handle some abuse cases. In other words, the appropriateness of domestic violence mediation depends not on what the remedy is called but on whether it is likely to offer effective protection against abuse.

Regardless of which cases are accepted, some of the following procedures should be incorporated into the screening process to help identify cases in which violence is occurring, to provide the program with adequate information to make an informed decision about whether to accept the case, and to give the party seeking assistance information about what would be offered to her through mediation or through other remedies.

2. Ask about violence.

In every case involving a complaint about a spouse, former spouse, lover, former lover, or family member, the intake procedure should include questions about whether there has been any violence between the parties.²⁰¹ Detailed questions asked by a sensitive interviewer may bring out a wealth of information that the victim would not reveal unprompted. Intake interviews

²⁰⁰A therapist in the Domestic Intervention Program in Miami, Florida reported that the less developed the cycle of violence, the greater the likelihood of success in treatment. Interviews with staff of Domestic Intervention Program, Miami, Fla., Jan. 1980.

²⁰¹In identifying battering cases, four types of abuse must be distinguished: physical battering, sexual violence, psychological battering, and destruction of property or pets. See *supra* text accompanying notes 9–13. Psychological abuse may be far more destructive when accompanied by physical or sexual violence because the use of force creates an atmosphere of greater coercion. A. GANLEY, *supra* note 10, at 12. If mediation programs choose to accept cases involving emotional abuse alone, and to reject those involving psychological battering in conjunction with other forms of abuse, the screening criteria must distinguish between the two forms.

should be conducted in private; joint interviews may produce incomplete information if violence has occurred, and may place the victim in danger of retaliation.

In addition to asking about recent incidents of violence, the intake interviewer should obtain a history of previous violence in the relationship. Questions might probe the duration of the violence, the frequency of the attacks, the severity of the violence, and the types of assistance sought in the past.

3. Disclose information about mediation and other alternatives.

When cases are screened for mediation, parties should be informed about exactly what they can — and cannot — expect from mediation. Many people who seek mediation do not understand what mediation is, nor how it differs from formal court remedies.²⁰² The mediation process and the types of terms included in a typical agreement should be described. The victim should be told whether and how a mediation agreement can be enforced. She may be able to predict whether a voluntary, unenforceable agreement will change the behavior of the person who is abusing her. The interviewer should discuss all available legal options, and let the victim determine which one is most likely to stop the violence.

C. The Mediation Hearing

Many adjustments in the mediation bargaining process could make the hearing more effective in stopping violence.²⁰³ Most of these changes are aimed at correcting the power imbalance that exists within most violent relationships. Mediators often assume

²⁰²Many abused women came to the Women's Rights Clinic at Antioch having just signed up for a mediation hearing. Often they would simply say they had been given a "hearing date" and were unable to answer questions about what sort of hearing they had arranged for.

²⁰³One example of such a modified process occurs in the D.C. court system. To reduce the number of contested hearings on civil protection orders, parties who appear for a hearing are offered an opportunity to meet with a third party before the case is called to discuss entering an order by consent. The third party, while maintaining some neutrality, acts as a negotiator/victim advocate. She explains to the abuser that if he admits the facts alleged and is willing to consent to some or all of the terms requested by the victim (*e.g.*, not to abuse his mate, to avoid contact with her, to give her custody of the children, or to vacate a residence) it may be possible to avoid a hearing. If the negotiation is successful,

that each party is free to air grievances and to ask for changes. If, in fact, coercion and intimidation are primary dynamics of most violent relationships, then mediation may simply provide a forum in which the abuser coerces the victim to do what he wants. Listed below are suggested techniques for changing the balance of power during mediation.

1. Encourage the victim to seek more formal remedies concurrent with mediation.

Participation in mediation should not preclude the victim from seeking other relief. Some abused women may wish to obtain a protection order or to participate in prosecution of the crimes which have been committed against them, and to use mediation as a forum in which to work out a visitation agreement, a property dispute, or some other issue. If the issue of violence is being dealt with elsewhere, that should be explicitly acknowledged in the agreement. The mediator should then explore how the possibility of further violence affects the issue(s) under discussion. For example, the victim might wish to make visitation arrangements which would protect her from subsequent attacks.

The mediator should not treat other action taken by the victim as in conflict with the goals of mediation. The agreement should not include terms consenting to dismissal of pending actions. If multiple remedies are being pursued, careful consideration should be given to the timing of the mediation hearings — mediators often have more flexible schedules than judges. The mediator should consider the impact on mediation of impending or recently past court hearings and should ensure that the mediation does not become an opportunity for the abuser to retaliate against his mate for taking other action.

2. Begin mediation by meeting separately with each party.

A private meeting with the victim in which she can speak in confidence about the violence gives her an opportunity to disclose more about the abuse than she could in the presence of the

the proposed consent order is reviewed by a judge and a protection order is issued. If, however, the abuser denies the facts alleged or refuses to consent to the relief requested, then a hearing takes place. Telephone interview with Meshal Thomas, Feb. 21, 1984, Washington, D.C.

abuser. The abuser may dislike this arrangement because it will make it impossible for him to monitor what his mate tells the mediator. The victim's confidences must not be disclosed to the abuser without her prior permission.

During a private meeting with an abuser, mediators may hear a distorted account of the violence; the abuser may try to persuade the mediator that the victim's conduct was the cause of the violence. If the mediator appears to approve this explanation of the violence, he or she may undermine the effectiveness of any subsequent agreement.

3. The mediation hearing should include a thorough discussion of past violence as well as a discussion of future violence.

Early in the hearing the mediators should attempt to develop a consensus between the parties about what violence has occurred. If the parties fail to agree on that issue, or if the victim withdraws previous allegations against her mate, it may be difficult to reach a meaningful agreement that the violence will stop. This discussion should also explore who is responsible for the violence; the mediator should be clear that violent acts are the responsibility of the actor, not of the victim.

4. Encourage parties in violent relationships to use advocates during mediation.

Because the mediator's duty is to remain neutral, it is difficult for him or her to fulfill an advocacy role. Battered women are often unaware of their rights and/or poorly equipped to assert their wishes, especially in the presence of the abuser. A third party may be better able to articulate the victim's needs. Similarly, an advocate for the abuser could help to foster an atmosphere in which communication is possible.

Because mediation is an informal process, the parties need not be represented by attorneys. Lay advocates for battered women frequently accompany clients to hearings in court, to hospitals, or to other public agencies. Although many programs are unable to provide advocates for all parties who seek mediation, intake staff should at least inform parties of the option of obtaining an advocate, and discuss the possible benefits of having an advocate present at a mediation hearing.

The presence of advocates may result in longer hearings and may make it less likely that an agreement will be reached. Advocates may not sidestep difficult issues and may block compromises which would harm the parties they represent. This may be inconsistent with the interests of the mediators but beneficial to the victim.

5. Require that persons accused of assaulting their mates participate in individual or group counseling before mediation.

Men who batter commonly deny or minimize their violent behavior. If the abuser denies the violence, any agreement to stop the violence is meaningless. Counseling which focuses on the violence and encourages the abuser to assume responsibility for his own actions may make it possible for the parties to talk about the violence.

The victim of abuse might also benefit from participation in a counseling program for abused women before undertaking mediation. Victims should be informed about the availability of such services and encouraged to participate, but victim counseling should not be mandatory.

6. Keep open the option that no agreement will be reached.

If the parties cannot agree about what violence has occurred, who is responsible for the violence, whether it should stop, or what is needed to stop it, the hearing should conclude without an agreement. Under such circumstances, an agreement dealing with abuse or other issues could create false expectations that the parties' problems have been solved. It may encourage a victim to reconcile with her mate, even if subsequent violence is likely. The victim also may feel that she has had her "day in court" and be less likely to seek formal legal action than if the mediation were inconclusive.

7. If an agreement is reached, identify weak terms and discuss what options exist if the agreement breaks down.

A realistic agreement between parties to a violent relationship should address the difficult issues. The parties must recognize, however, that such an agreement is not a solution in itself, but is only the beginning of a problem-solving process.

It may be useful for the mediator to meet privately with the victim at the end of a mediation hearing to talk with her about what she can do if she is beaten again. In abuse cases it is inappropriate simply to encourage parties to return for more mediation if an agreement fails. The victim often will attempt informal intervention before concluding that the abuser will not voluntarily stop the violence and that she needs the coercive power of the criminal justice system. Victims should be encouraged to pursue formal remedies if the violence recurs.

D. Terms of Agreements

The terms of a mediation agreement in any case involving domestic violence should be designed to protect the victim from subsequent abuse. Many of the terms included in protection orders could also be used in mediation agreements. On the other hand, some terms commonly included in mediation agreements are inappropriate in cases involving domestic violence.

1. Do not condition the abuser's agreement to stop the violence on the victim's agreement to change her behavior.

The agreement should make clear that the victim has a right not to be beaten regardless of what she says or does, and that the abuser has a responsibility to control his violent behavior. The mediation agreement should not be a "shopping list" of promises by each party to change all the behavior which is objectionable to the other. Most important, the victim should not agree to avoid behavior which the abuser identifies as the cause of his violence. This implies that the violence is a shared responsibility, and secures the victim's safety only in exchange for her obedience.

2. The agreement should include a statement describing the violence which has occurred.

The statement of facts creates a record of the violence. If the beatings continue, the victim can use this record in subsequent proceedings to demonstrate a history of violence. The mediation

program should maintain a permanent file of all mediation agreements reached.

3. Include a no-contact order if requested by the victim.

The victim may feel that her safety depends on the abuser staying away from her. If the abuser is unlikely to observe the agreement, the victim may need to move to another place. If the abuser is likely to respect the agreement, then he should bear the inconvenience caused by the violence. In the latter case, the agreement might include terms requiring the abuser to avoid all places regularly frequented by the victim. "No contact" orders should be as specific as possible; if some contact between the parties is to be allowed, the agreement should specify the form of permissible contact (telephone, mail, in person, through attorneys) and the circumstances in which contact is permissible.

4. Set up protective arrangements regarding visitation.

The issue of contact arises frequently when children are involved. The agreement might specify that visitation occur at some specified place other than the residence of the victim. If the abuser poses any threat to the children, the agreement could require a third party to supervise visitation. Abusers often attempt to remove the children from the custody of the victim; the agreement should outline restrictions to prevent childsnatching.

5. The agreement could include compensation for the victim.

Issues involving money may be addressed in a mediation agreement, although the parties should be advised of the benefits of consulting private counsel before concluding agreements on child support or alimony. In addition, the agreement might include a promise by the abuser to compensate the victim for medical expenses, attorneys' fees, moving expenses, or property damage incurred as a result of the abuse.

The terms of each agreement will depend on the facts of the case and on the parties' particular problems. The terms suggested above may appear one-sided, but this "imbalance" is appropriate.

Any compromise by the woman forces her to pay a price for her own safety. This approach is inconsistent with the usual premise of mediation that problems can only be solved by mutual concessions. Of course, the woman makes a major (although often unstated) compromise with her mate simply by agreeing to participate in mediation, and, in many cases, by agreeing to give him a chance to stop the violence. Moreover, an apparently one-sided mediation agreement actually resembles a consensual protection order, which is issued only against the offending party. A mediated agreement which approximates results that could have been achieved through the criminal justice system brings the mediation process a step closer to the more effective remedies developed within the law enforcement model.

E. Enforcement

1. Mediation agreements in domestic violence cases should be enforceable in court.

The simplest method of enforcement is to incorporate the mediation agreement into a consensual protection order. In such circumstances, a contested hearing would be unnecessary; the judge would simply sign an order giving the mediation agreement the force of law, and dictating that the same consequences would stem from the abuser's violation of the mediation agreement that would attach to violation of a protection order.²⁰⁴

Alternatively, mediation could be conducted as part of a criminal proceeding. Cases would be diverted to a mediation program after charges had been filed, and deferral of prosecution would be conditioned on the abuser's compliance with the mediation agreement. Similarly, mediation could be conducted post-conviction and pre-sentencing, to give the victim some input in the sentencing process. Finally, mediation could be conducted as a prerequisite to a sentence of probation, and the terms of the mediation agreement made conditions of probation. In criminal cases, prosecution should resume immediately upon discovery of a violation.

²⁰⁴Under these circumstances, mediators could arrange only for relief made available under the state protection order law.

2. Mediators should monitor abusers' compliance with agreements.

Effective enforcement of any remedy provided to an abused woman requires monitoring the abuser's behavior to ascertain whether there has been subsequent violence. The need for monitoring is greatest when continued contact between the parties is likely. Abuse cases must be actively tracked after they leave the mediation program, because the victim may be prevented by her partner from reporting violations of an agreement. Tracking of cases identifies violations and permits enforcement of agreements. This, in turn, deters other abusers from violating mediation agreements. Tracking can also provide useful feedback to a mediation program about the effectiveness of its services. As patterns in violation of agreements emerge, mediators will learn whether and how abuse cases can be successfully mediated.

There are many methods of tracking cases. The abuser could be required to report periodically to a monitor. During periodic phone conversations with victims, mediators could ask whether violations have occurred. Another possible method would be to require in the mediation agreement that the abuser participate in counseling; the counselor would then be responsible for discovering violations.

None of these methods is likely to produce complete data. An abuser will probably make every possible effort to conceal violations. A victim might not report a violation if she had been threatened with retaliation, if she believed that reporting would threaten a fragile reconciliation, or if she had had a bad experience with previous intervention and believed that the mediation program would not be helpful. Careful tracking can, however, identify many violations which would not have been voluntarily reported, and in which some subsequent intervention could be useful.

These suggestions for enforcing mediation agreements underscore that mediation is only a second-best solution, and that other remedies which are more easily enforced are preferable. Nevertheless, mediation can be improved, as a remedy in domestic abuse cases, by connecting the mediation agreement with more formal action.

F. Training

Mediators should receive extensive training on wife abuse.

Mediators, like most court and law enforcement officials, usually have only a superficial understanding of domestic violence. If they receive training on the nature and causes of abuse, and on how their responses can either remedy or perpetuate the violence, then mediation services will improve.

Training can have a significant impact on the progress of a mediation hearing. For example, a mediator might ask both parties whether there had been violence. The victim might say yes and the abuser might say no. An untrained mediator might conclude that someone was lying, but could use only his or her intuitive judgment of the parties' credibility to determine who was concealing information. A trained mediator would know that denial of violence is characteristic of abusers and that victims are unlikely to fabricate accounts of abuse. A trained mediator would have learned techniques to penetrate the abuser's denial of his conduct and would know that a meaningful agreement is possible only when violence is acknowledged.

Similarly, an untrained mediator, hearing from both parties that the abuse occurred only when the abuser had been drinking, might conclude that alcohol abuse was the cause of the physical violence. The mediation might then focus on referring the abuser to treatment for his alcoholism, with the assumption that the violence problem would then be eradicated. A trained mediator would know that alcohol intake often triggers incidents of violence but does not actually cause the violence. He or she would know that the two problems are distinct and must be treated separately. A hearing with a trained mediator would address each problem individually rather than treating them as one issue.

Much domestic violence training currently conducted presents differing and often contradictory viewpoints about the nature of the problem and the solution.²⁰⁵ Sponsors of training programs

²⁰⁵For example, in the summer of 1983, the Army conducted a Family Advocacy Workshop which focused mainly on domestic violence. One presenter placed responsibility for the violence on the abusive party, while another described spouse abuse as a function of family dynamics, and recommended that the problem be treated as caused by the interaction of all individuals involved. One workshop encouraged a stronger law enforcement response to abuse, while another advocated mediation of domestic disturbances.

must educate themselves about family violence, and then critically evaluate the ideas espoused by different trainers. Perhaps the best source of trainers is the staff of a local battered women's shelter. Most shelter workers are knowledgeable about domestic violence and are anxious to share their learning with other community groups serving violent families. Shelter workers are aware of all the available resources in the community to which batterers or victims can be referred.

Mediation is a quasi-legal and a quasi-therapeutic process; mediators therefore need both the skills of a legal advocate and those of a therapist. These include: (1) techniques for identifying battering cases; (2) techniques for counseling victims and abusers; (3) knowledge of local laws, and of law enforcement and court practices regarding domestic violence; (4) awareness of legal, mental health, and other services for people in violent relationships; (5) awareness of collateral services, such as treatment programs for alcoholics or public benefits programs; and (6) a general understanding of political, psychological, and sociological perspectives on wife abuse.

Training for mediators is more important than for providers of other types of services to violent families because traditional mediation is fundamentally at odds with the needs of violent families. Mediators of abuse cases who act without extensive training risk perpetuating the violence they hope to eradicate.

CONCLUSION

Mediation is not a desirable remedy for abuse cases, even in an overburdened law enforcement system. However, the law enforcement alternatives are not immediately available or effective in every community.

A Civil Rights Commission report on domestic violence stated that "[m]ediation and arbitration should *never* be used as an alternative to prosecution in cases involving physical violence."²⁰⁶ In fact, of the at least 180 mediation programs currently operating in the United States, a substantial number accept cases involving

²⁰⁶RULE OF THUMB, *supra* note 36, at 96 (emphasis added).

domestic violence.²⁰⁷ Many of them will continue to do so despite the recommendation of the Civil Rights Commission.

Proponents of the mediation model and of the law enforcement model of response to wife abuse disagree about the extent to which domestic violence cases are currently channelled into mediation and about whether such referrals are appropriate. The mediators assert that they do not handle cases involving "serious" abuse and that the "minor" cases that they do handle are appropriate for mediation. Advocates for abused women assert that every abuse case either is, or may become, serious. They further suggest that victims of abuse are seriously disadvantaged in mediation because of the power imbalance of the parties and the failure of so many mediators to recognize the imbalance. Victims are also disadvantaged in mediation by being held partly responsible by mediators for the violence and by being offered a remedy which provides no enforceable protection.

It is not clear how this controversy can be resolved. Empirical analysis is somewhat useful, though many questions remain unanswered. One study examined the effectiveness of mediation in different types of cases, and concluded that mediation is a useful remedy in general, but expressed some reservations about mediation of abuse cases.²⁰⁸ Another study examined mediation by police, and concluded that violence is more effectively deterred by arrest than by mediation.²⁰⁹ More research is needed, especially in evaluating the new remedies for abused women developed during the last decade.²¹⁰ A comparative analysis of the various remedies may be years away, especially if research funds continue to be sparse. During the interim, mediation will probably continue to be a popular remedy, because it helps courts, prosecutor's offices, and police departments to dispose of vast numbers of unwanted cases.

²⁰⁷See *supra* note 58. Although the article does not state what percent of these programs accept domestic abuse cases, the implication is that a large percentage do.

²⁰⁸See *supra* text accompanying notes 117-20.

²⁰⁹See *supra* text accompanying notes 114-15.

²¹⁰One unexplored area concerns the effectiveness of protection orders. Do they reduce violence? If so, in what types of cases are they most effective? What is the impact of enforcement on the effectiveness of the orders? Another area of future study concerns the deterrent or rehabilitative impact of criminal prosecution of abusers. Additional work is needed on the relative efficacy in stopping violence of working with the couple, with the abuser alone, or with many abusers in group counseling.

If those who advocate law enforcement are correct in suggesting that domestic abuse may best be eliminated through institutional behavior which holds the abusers responsible for the violence, then mediation is the least appropriate of available legal remedies for wife abuse. Formal legal remedies are more likely to prevent subsequent abuse. Some mediators will undoubtedly reject the conclusions drawn by proponents of the law enforcement model. Others, however, may begin to refer abuse cases elsewhere or to modify their mediation techniques in keeping with the law enforcement critique. Modified mediation techniques will not blame the victim for the violence, but rather, will strive to reduce the inequality of bargaining power between the parties.

The recommendations for mediators in this Article are not intended to support mediation of abuse cases; the broader analysis suggests that other remedies are preferable. The recommendations instead acknowledge the reality that the alternative dispute resolution movement is upon us and recognize that many programs are immovably committed to including wife abuse cases on their dockets. The Article is addressed in part to those programs, and is intended to begin a dialogue focused not on what the remedy is called but on what elements are needed for any legal remedy for wife abuse to be effective.

